SUPREME COURT, U. S.

FILED

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IN THE

# Supreme Court of the United States

October Term, 1958

No. 651

JOHN R. BEVIL, JR., ET AL., *Petitioners*

v.

MARGARET O'BOYLE, ET AL., *Respondents*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT


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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above entitled case on September 26, 1958.

## OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit is printed in Appendix D hereto, *infra*, App. page 35, and is reported in 259 F. 2d 506. The Findings of Fact and Conclusions of Law and the Final Judgment and Decree of the District Court (Tr. of R. 110-120) are printed in Appendix C hereto, *infra*, App. page 26. There is no opinion by the District Court.

## JURISDICTION

The judgment of the Court of Appeals was entered on September 26, 1958. Tr. of R. 218; App. page 60, *infra*. Rehearing was denied on November 7, 1958. Tr. of R. 234; App. page 61, *infra*. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254 (1).

## QUESTIONS PRESENTED

1.

Does a United States District Court have jurisdiction of a case in which numerous plaintiffs claim separate tracts of land separately, and do not claim undivided interests in a common tract, and plaintiffs combine in a suit to set aside two State Court judgments alleging them to be a cloud on their respective titles, and the evidence adduced on the hearing of Defendants' Motion to Dismiss, that being the only evidence in the case on the question of the value of the matter in controversy, shows that the land claimed by each plaintiff (with the possible exception of one plaintiff) is of less than Three Thousand ($3,000.00) Dollars in value?

2.

Should a United States Court permit the non-resident plaintiffs in this collateral attack upon State Court judgments, each regular upon its face and containing recitals of valid citation and service, impeach such judgments and the jurisdictional recitals therein contained by other parts of the record in such cases where under State law such recitals could not be so impeached in a collateral attack?

3.

Where, as is true in Texas, jurisdictional recitals in a judgment of a Court of general jurisdiction, reciting due and legal service of process on defendants, are accorded absolute verity when subjected to a collateral attack, does the application of the rule of absolute verity, in this case constitute a denial of due process of law to the non-resident plaintiffs who are in this case making a collateral attack upon two State Court judgments rendered by a Court of general jurisdiction and containing such jurisdictional recitals, the plaintiffs herein being the defendants in the State Court suits?

4.

Was John R. Bevil guilty of fraud in the prosecution and trial of the two State Court suits when he did all that the State law required him to do in pleading and proving up his case in each suit?

5.

Assuming, as was held by the Court of Appeals, that "the bar of the statute in an action to set aside a judgment for fraud in Texas does not commence to run until the plaintiff knows of the judgment, or, in the exercise of due care, ought to know of the judgment against him," is the burden, under the Texas law, on the defendants (Petitioners herein), pleading the bar of the four year statute of limitations to make proof that plaintiffs (Respondents herein) knew, or, in the exercise of due care, should have known, of the State Court judgments more than four years before the filing of this action?

6.

Whether, in this collateral attack on, and suit to set aside, two State Court judgments, each more than ten years old when this suit was filed, the four year statute of limitations of the State of Texas, Article 5529, Vernon's Annotated Texas Statutes, specially pleaded by Petitioners, as defendants herein, constitutes a bar to a recovery by Respondents, as plaintiffs herein, there being no evidence whatsoever that Respondents did not know, and by the exercise of reasonable diligence would not have known, of the rendition and entry of such judgments more than four years before the filing of this suit, and there being no admission, but a denial, of such lack of knowledge on the part of Respondents in the pleadings of Petitioners.

7.

Is the affidavit for citation by publication in the State Court suit of *Bevil v. Chivers*, No. 8399, made two days before the filing of such suit, in compliance with Rule 109, Vernon's Annotated Texas Rules of Civil Procedure, providing that where the party or his attorney "shall make oath when the suit is instituted or at any time during its progress" that any party defendant is a nonresident of the State the clerk shall issue a citation for such defendant for service by publication, in view of the fact that the pleadings of the Respondents herein specifically allege that they, and/or those through whom they claim, were nonresidents of Texas in 1924 and 1925, and since such dates have been nonresidents to the present time, including the time of the filing of such suit, which the Petitioners, in their answer herein, admitted to be true, it thus being established that the defendants in the case

of *Bevil v. Chivers* were nonresidents of Texas on the date such suit was filed as well as on the date the affidavit was made?

## CONSTITUTIONAL PROVISION, FEDERAL STATUTES, AND STATE STATUTES AND RULES OF PROCEDURE INVOLVED

The Constitutional provision involved is the due process clause of Section 1 of the Fourteenth Amendment to the United States Constitution which reads as follows:

> ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; . . ."

The United States statutes involved are Section 1331, Judiciary and Judicial Procedure, Act of June 25, 1948, Title 28, U.S.C., which reads as follows:[1]

> "The district courts shall have original jurisdiction in all civil actions wherein the matter in controversy exceeds the sum or value of $3,000, exclusive of interest and costs, and arises under the Constitution, laws or treaties of the United States"

and Subdivision (a) (1) of Section 1332, Judiciary and Judicial Procedure, Act of June 25, 1948, Title 28, U.S.C., which reads as follows:[2]

> "(a) The district courts shall have original jurisdiction of all civil actions where the matter in con-

[1] This statute has been amended but at all times pertinent to this case it read as herein set forth.

[2] This statute has been amended but at all times pertinent to this case it read as herein set forth.

troversy exceeds the sum or value of $3,000, exclusive of interest and costs, and is between:

(1) Citizens of different states:"

The State Statutes involved are from Vernon's Annotated Texas Statutes and are Article 1975 (App. page 2), Article 1976 (App. page 3), Article 5529 (App. page 5) and Article 7364 (App. page 1).

The State Rules of Civil Procedure involved are from Vernon's Annotated Texas Rules of Civil Procedure and are numbered Rule 109 (App. page 2), Rule 115 (App. page 2), Rule 244 (App. page 4), Rule 329 (App. page 5), Rule 783 (App. page 1), Rule 800 (App. page 2), Rule 810 (App. page 3), Rule 811 (App. page 4), and Rule 812 (App. page 4).

## STATEMENT

Alleging violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States and diversity of citizenship (together with allegations that the matter in controversy exceeds Three Thousand Dollars in value) as jurisdictional grounds (Tr. of R. 2), Respondents filed this suit against Petitioners on July 16, 1956, attacking two judgments rendered by the District Court of Hardin County Texas, in cases styled and numbered in such Court as *John R. Bevil v. A. L. Chivers, et al.*, No. 8399, in which judgment was rendered on August 29, 1945, and *John R. Bevil v. W. S. Johnson, et al.*, No. 8471, in which judgment was rendered on January 7, 1946, such cases being hereinafter referred to collectively as the State Court suits and the judgments being referred to collectively as the State Court judgments. Such judgments are not copied in the Transcript of the

Record but copies thereof are attached to Defendants' First Amended Motion to Dismiss, which Motion was sent up in original form with the Transcript of Record.[3]

Most of the Respondents were defendants in one or both of the State Court suits, the others who were not parties to either State Court suit being heirs or successors in claim to parties who were defendants in one or both of such suits; however, we will refer to Respondents in this Petition as if all of them had been parties defendant to one or both of the State Court suits. Petitioners are the heirs of John R. Bevil, sometimes herein referred to as J. R. Bevil or as Bevil, plaintiff in the State Court suits, and his wife, both now deceased, and are successors in title to said Bevil by virtue of a conveyance from him.

Each of the State Court suits was the type of action designated under Texas practice as Trespass to Try Title and was brought under the Texas Statutes and Rules of Civil Procedure governing such actions. In each suit Bevil sued for the title to and possession of a specific tract of land out of the Hawley League in Hardin County described in the pleadings and judgment in such suit by field note or metes and bounds description. As shown by the judgments, service of process on the defendants in each case was by citation by publication.

Respondents attacked the State Court judgments on two grounds - alleged procedural defects and alleged fraud. They set forth numerous acts and omissions which they contend were procedural defects (Tr. of R. 8-13) but it is not deemed necessary to detail such acts and omissions at this point.

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[3] The State Court judgments are copied in Appendix E hereto, App. page 62.

With respect to their contention of fraud, Respondents alleged that they, respectively, held title to and owned certain lots or tracts in and a part of the G. M. B. Hawley Subdivision of the Joel E. Hawley League, each of said Respondents having acquired title to his or her respective lot or lots by virtue of deeds from Texas Little Farms Company. They further alleged that all of the lots so referred to or set forth in such paragraphs are within the boundaries of one or the other of the two tracts of land described in the two State Court judgments.

Further, they alleged that in the year 1924 John R. Bevil, by three deeds, conveyed to Texas Little Farms Company certain land including the lots to which Respondents assert claim and title in this suit (Tr. of R. 3-4). The acts of Bevil alleged to constitute fraud are that on the trial of the State Court suits the three deeds above referred to (and three releases of vendor's lien) from Bevil to Texas Little Farms Company and the deeds from Texas Little Farms Company to Respondents were not introduced in evidence by Bevil (Tr. of R. 13-15), and that such deeds and releases were not set out in his pleadings in such suits.

Petitioners filed their Motion to Dismiss and their First Amended Motion to Dismiss (App. page 6), urging dismissal of the action on the following grounds, among others:

(a) because the amount actually in controversy was less than Three Thousand Dollars in value, and

(b) because the Complaint shows that the judgments attacked were each over ten years old when this action was filed and the four year statute of limitations of the

State of Texas is a bar to the action and any recovery by plaintiffs.

Such Motion was presented to the District Court and was by such Court denied.

For answer (Tr. of R. 69-94), Petitioners pleaded, among other things, that the deeds through which Respondents claim, as set forth in their pleadings, conveyed no land whatsoever (Tr. of R. 73-74); that J. R. Bevil, prior to the time of the filing of the State Court suits, had never sold or conveyed any of the land which Respondents contend in this suit that they own (Tr. of R. 72-73), such land being in Block "A" shown on the Plat of the Hawley Subdivision and not containing any numbered lots or tracts;[4] that each of the judgments is a valid and subsisting judgment containing recitals of service of process which recitals are entitled to and import absolute verity and that each of such judgments constitutes an adjudication of the title to the land described therein (Tr. of R. 80-82); denied that Respondents did not actually know of the entry of the State Court judgments prior to four years before the instant suit was filed and pleaded the four year statute of limitations of the State of Texas as a bar to any recovery by Respondents (Tr. of R. 82-83); denied that John R. Bevil was guilty of fraud in obtaining the judgments (Tr. of R. 92); denied that such judgments were void, illegal and invalid and denied that they violated the due process clause of the Fourteenth Amendment to the Constitution (Tr. of R. 92).

After a trial of the case on the merits, and based upon appropriate Findings of Fact and Conclusions of Law (Tr.

[4] The map or plat of the Hawley Subdivision referred to is reproduced at App. page 21.

of R. 110-116), the District Court rendered judgment denying Respondents the relief sought by them (Tr. of R. 117-120).

The majority opinion of the Court of Appeals (App. page 35), with Chief Judge Hutcheson dissenting, reversed the judgment of the District Court and remanded the case to such Court for the "entering of such further equitable relief as is appropriate in light of this opinion and judgment." At this point, we will not set out, in any detail, the holdings contained in the majority opinion since such holdings will be set forth and discussed under "Reasons for Granting the Writ." Here, we simply say, the majority opinion held that there were procedural defects vitiating and rendering void the proceedings and the judgments in the State Court suits; that the application of the rule of absolute verity is not called for in this case but, if here applied, would violate the due process of law provision of the Constitution; that John R. Bevil was guilty of legal fraud in obtaining the State Court judgments; that Petitioners failed to meet the burden of proof required of them under their plea of the four year statute of limitations; and that the State Court judgments were void and should be set aside.

As stated, Chief Judge Hutcheson dissented (App. page 57). His views will be referred to in another portion of this petition and will not be discussed at this point.

## REASONS FOR GRANTING THE WRIT

Certiorari should be granted herein for the following reasons:

1. The District Court was without jurisdiction to entertain, hear and determine this cause, and should have

dismissed same, and certiorari should not be granted and the judgments of the Courts below reversed and the cause remanded to the District Court with instructions to dismiss same for want of jurisdiction because the matter in controversy does not exceed the sum or value of $3,000.00.

2. The Court of Appeals has decided a Federal question in a way in conflict with the applicable decisions of the Supreme Court of the United States.

3. The Court of Appeals has decided important State questions in a way in conflict with applicable State law.

We will discuss such reasons in the order stated.

## I.

## THE DISTRICT COURT WAS WITHOUT JURISDICTION BECAUSE THE MATTER IN CONTROVERSY DOES NOT EXCEED THE SUM OR VALUE OF $3,000.00

Respondents, as plaintiffs, sued jointly to set aside and enjoin the enforcement of two State Court judgments and to remove same as cloud upon the titles of plaintiffs. It is shown by the pleadings that Respondents in the aggregate claimed title to 34-1/2 lots or tracts of land in the Hawley Subdivision, which lots or tracts they contend are within the boundaries of the land described in the two judgments (Tr. of R. 23-49). It is shown by the plat in evidence (App. page 21) that the lots in the Subdivision involved contain 10 acres of land each. It is shown by the pleadings that the Respondents did not claim to own the entire 34-1/2 tracts, or 345 acres, jointly, but, to the contrary, it is shown that each Respondent, or group of Respondents, claims to own one or more tracts separately and in severalty. Paragraph 15 (Tr. of R. 23) alleges that

plaintiffs "Joseph A. Bodie, Jr., and his daughter, Ann Bodie Ward joined by her husband, Sherman Ward, own Tract No. 67 embraced in Suit No. 8399; . . ." This is illustrative of the allegations of claim of ownership of each Respondent or plaintiff. It is clear from the pleadings and from the evidence that there is no claim of joint ownership but that each plaintiff, or group of plaintiffs, claims title to a particular lot or lots in severalty.

According to the Complaint the individual Respondents, or groups of Respondents, claim and assert title to a lot or lots designated as follows:

| *Par. No.* | *Respondent or Group of Respondents* | *Lot or Lots Claimed* |
|---|---|---|
| 15 | Joseph A. Bodie, Jr. et al | No. 67 |
| 16 | Barbara Ferber et al | No. 68 |
| 17 | Alexander Luckanick et al | Nos. 70, 71, 72, 98 & 99 |
| 18 | C. M. Schriener et ux | No. 73 |
| 19 | Isidore Feuer | No. 92 |
| 20 | T. Herbert Johnson | No. 97 |
| 21 | Henry J. Schneidt et al | Nos. 100 and 101 |
| 22 | Emma J. Miller | No. 102 |
| 23 | O. M. Hazelton et al | No. 110 |
| 24 | Anna Berger et al | Nos. 112 and 157 |
| 25 | A. D. Davies | Nos. 113, 115, 116, 137 138, 154, 155 & 180 |
| 26 | Margaret O'Boyle | Nos. 114 and 182 |
| 27 | Sadie E. Gromlick | No. 141 |
| 28 | W. J. Brong et al | Nos. 142 and E/2 of 193 |
| 29 | Lillian E. Von Beck Koch et al | No. 143 |
| 30 | Bernice P. Brown et al | Nos. 144 and 159 |
| 31 | W. E. Lukens | No. 178 |
| 32 | Dr. C. A. Craig | No. 199 |
| 33 | John J. Lawler | No. 202 |
| 34 | Lula M Snider et vir | No. 203 |

The Amended Complaint (Tr. of R. 3) contains the allegation ". . . the matter in controversy exceeding $3000.00 in value." Defendants denied such allegation (Tr. of R. 69) and also raised the question of lack of jurisdictional amount in their First Amended Motion to Dismiss (App. page 12). Defendants' Amended Motion to Dismiss was overruled and the District Court found that ". . . the value of the property involved herein is in excess of Three Thousand Dollars."

On the trial of the case on the merits there was no evidence at all as to the value of the matter in controversy. Attached to Defendants' First Amended Motion to Dismiss, as an Exhibit thereto, is an affidavit made by L. L. Williams (App. page 24) stating his qualifications to express an opinion as to the value of the land in the Hawley League and stating that such land has a value of $30.00 per acre. An affidavit of R. F. Roberts, attorney for Respondents, is attached to Plaintiffs' Answer to Defendants' First Amended Motion to Dismiss, which Answer was sent up with the record in the case, such affidavit referring to lots identified as 70, 71, 72, 98 and 99, which are claimed by Respondents Alexander Luckanick et al., according to Paragraph 17 of Plaintiffs' First Amended Original Complaint (Tr. of R. 25). The affidavit of Mr. Roberts says the five lots referred to have a value of $4,200.00. His affidavit deals with these lots and these only. There is, therefore, no evidence of value with respect to the lots or tracts claimed by the other Respondents except the affidavit of L. L. Williams that the land in the Hawley League has a value of $30.00 per acre.

This Honorable Court has very clearly announced the applicable law in this situation. In the case of *Clark*,

*Director of Motor Vehicles, et al. v. Paul Gray, Inc., et al.*, 306 U.S. 583, 588, 589, 590; 59 S. Ct. 744, 748, 749, it is said:

> "A Motion of Appellants in the Court below to dismiss the bill of complaint for want of the jurisdictional amount was withdrawn, and the jurisdiction of the District Court is not challenged here. But on the argument, it appearing doubtful whether the 'matter in controversy' exceeded 'the sum or value of' $3,000, . . ., we raised the question whether the jurisdictional amount was involved, as was our duty. . . . The bill of complaint alleges generally that 'the amount involved in this litigation is in excess of Three Thousand Dollars ($3,000.00), exclusive of interest and cost'. But it is plain that this allegation is insufficient to satisfy jurisdictional requirements where there are numerous plaintiffs having no joint or common interest or title in the subject matter of the suit . . .
>
> "It is a familiar rule that when several plaintiffs assert separate and distinct demands in a single suit, the amount involved in each separate controversy must be of the requisite amount to be within the jurisdiction of the District Court, and that those amounts cannot be added together to satisfy jurisdictional requirements. . . . The general allegation in the bill of complaint that 'the amount involved in this litigation is in excess of' $3,000 and the finding of the court that 'the amount involved in the within action' exceeds the jurisdictional amount, give no indication that the amount in controversy with respect to the claim of any single plaintiff exceeds the jurisdictional amount and are insufficient to show that the District Court had jurisdiction of the case . . .
>
> "Examination of the record shows that only in the case of a single appellee, Paul Gray, Inc., is there any

allegation or proof tending to show the amount in controversy. . . .

". . . Proper practice requires that where each of several plaintiffs is bound to establish the jurisdictional amount with respect to his own claim, the suit should be dismissed as to those who fail to show that the requisite amount is involved. . . ."

In *Thomson v. Gaskill, et al.*, 315 U.S. 442, 447; 62 S. Ct. 673, 675, this Court held:

". . . Aggregation of plaintiffs' claim cannot be made merely because the claims are derived from a single instrument, . . ., or because the plaintiffs have a community of interest . . . In a diversity litigation the value of the "matter in controversy" is measured not by the monetary result of determining the principle involved, but by its pecuniary consequence to those involved in the litigation. . . ."

The amount or value of the claim of each Respondent, or group of Respondents, was not shown to be such as to invoke the jurisdiction of the United States District Court with the possible exception of that of Alexander Luckanick et al., which claim the affidavit of R. F. Roberts stated had a value of $4,200.00. Assuming a value of $84.00 per acre, the per acre value of the Luckanick claim as fixed by the Roberts affidavit, no other Respondent, or group of Respondents, was asserting claim to more than two tracts, or 20 acres, except A. D. Davies (see resume of claims, supra), and no such claim amounted to $3,000.00 in value. It is alleged that A. D. Davies owns eight (8) tracts but it was shown on the hearing on Defendants' Motion to Dismiss and is herein shown (App. page 19) that said Davies, by deed dated August 2, 1951, almost five

years before the filing of this suit, had conveyed to R. F. Roberts, counsel for Respondents herein, the surface estate and 7/16ths of the mineral estate in and to seven (7) of the eight (8) lots which the Complaint herein alleged are owned by Davies. It, therefore, is apparent that Davies does not actually own a claim having a value in excess of $3,000.00.

## II.

## THE COURT OF APPEALS HAS DECIDED A FEDERAL QUESTION IN A WAY IN CONFLICT WITH THE APPLICABLE DECISIONS OF THE SUPREME COURT OF THE UNITED STATES

The Court of Appeals held that application of the rule of absolute verity in this case would be a denial of due process of law. As we understand the majority opinion such holding is predicated upon the proposition that "but for the rule of absolute verity" the record in the State Court suits discloses procedural defects that show that the Court rendering the State Court judgments did not have jurisdiction, and that Respondents "are denied due process if the judgments are allowed to stand in spite of the procedural defects" (App. page 46).

We believe such holding to be in direct conflict with decisions of this Honorable Court.

In *Hall v. Law*, 102 U.S. 217, partition proceedings had in Indiana, under Indiana law, were attacked in a collateral proceeding in the United States Court. In the language of this Honorable Court, the basis of the attack was as follows (218):

> "The validity of this partition is assailed because no complaint or petition of the applicant for the parti-

tion appears in the record as the foundation of the proceedings and without one it is contended that they were void.

In holding that recitals of due notice in the order of the Court appointing commissioners could not be impeached on collateral attack, this Court said (218):

> "The recitals in the order show a compliance with the statute; they show jurisdiction in the court over the subject. That jurisdiction arises upon the presentation of the application, accompanied with proper proof of previous notice of it. The order of the court appointing the commissioners is a determination that the application is sufficient, and that due notice of it has been given. This conclusion is not open to collateral attack; it can only be questioned, on appeal or writ of error, by a superior tribunal invested with appellate jurisdiction to review it."

It is submitted that this Honorable Court in the above case sanctioned the rule that giving application to the doctrine of absolute verity with respect to recitals of due notice or due and legal service in orders, judgments and decrees of Courts of competent jurisdiction is not a denial of the due process of law provision of the Constitution.

## III.

## THE COURT OF APPEALS HAS DECIDED IMPORTANT STATE QUESTIONS IN A WAY IN CONFLICT WITH APPLICABLE STATE LAW

1. The judgments attacked in this case contain jurisdictional recitals reciting due and legal service of process on the defendants in such cases. In each of such cases the following recitals and findings appear in the judgment

(App. pages 62 and 65): ". . . but the defendants, and each of them, although duly and legally cited by publication to appear and answer herein. . ." and ". . . the court finds that the defendants, and each of them, have been duly cited in terms of law and as required by law to appear and answer herein; . . ."

It was and is the contention of Petitioners herein that such recitals and findings, under the Texas law, import absolute verity and must be accorded absolute verity and cannot be impeached in this collateral attack by reference to other parts of the record in the case or by any other evidence. The District Court agreed with Petitioners and so held. With reference to the rule and doctrine of absolute verity, the Court of Appeals held (App. pages 45-47):

(a) that the rule of absolute verity is not uniformly applied in Texas, citing as authority for such statement *Fowler v. Simpson* (Tex. Sup. Ct.), 15 S.W. 682, and *Lutcher v. Allen* (Tex. Civ. App. - err. den.), 95 S.W. 572;

(b) that it is not clear what the law of Texas is where there is a finding of due and legal citation by publication and there was an anterior defect such as the absence of a valid affidavit;

(c) that as to a nonresident defendant the rule of absolute verity cannot be imposed to prevent an inquiry into the record facts showing that nonresident service was not legally obtained;

(d) that the application of the rule of absolute verity in this case would be a denial of due process of law; and

(e) that the rule of absolute verity would be no bar to the attack on the judgment in *Bevil v. Johnson*, No. 8471, such judgment having been entered seven days before return day.

The Court of Appeals misconstrued the decision and opinions in *Fowler v. Simpson*, supra, and *Lutcher v. Allen*, supra.

We think it sufficient to say that in the *Allen* case the judgment revealed *on its face* that it was one in personam based on citation by publication. Certainly such judgment was not entitled to the protection of the absolute verity rule and is no authority for the proposition that a judgment in rem, such as the State Court judgments here under attack, reciting due and legal service, may be impeached on collateral attack in any Court, State or Federal.

In the *Simpson* case the judgment itself pointed to and identified the very process which was the basis of the judgment. Such judgment contains the following recitals:

> "Plaintiff appeared by attorney, and the defendants, though duly cited by publication according to law, which citation was returned into this Court prior to the September Term, A. D. 1883, came not, but made default, . . . . *Plaintiff introduced the citation* by publication with the return thereon, executed according to law, and *returned on the 29th August, 1883.*" (Emphasis added).

The citation definitely identified and introduced in evidence in the case in which the judgment was under attack was not sufficient to comply with the law in force. Because the citation or process upon which the judgment was predicated was definitely identified, such citation could be looked to and the rule of absolute verity could not be applied.

In *Last Chance Gas Company v. Ellinger* (Tex. Civ. App.), 14 S.W. 2d 82, 85, the Court distinguished be-

tween a situation wherein the judgment recited merely that the citation was by publication and the *Simpson* case wherein the judgment identified the citation by referring to the date it was returned and otherwise describing it, saying:

> "The recitation in the judgment, that citation was by publication, is not a sufficient identity of the writ to bring this case under the holding of Fowler v. Simpson, 79 Tex. 617, 15 S.W. 684, 23 Am. St. Rep. 370, because the judgment in that case not only recited citation by publication, *but identified the citation 'by referring to its date, the return of the officer and the writ upon which the court's conclusion of lawful service of process was based.* Instead of relying upon a presumption it points out the proof upon which its validity depends'." (Emphasis added).

The Court of Appeals misconstrued Texas law when it held that it was not clear what the law of Texas is where there is a finding of due and legal citation by publication and there was an anterior defect such as the absence of a valid affidavit. The law of Texas is clear and uniform to the effect that a defective affidavit may not be the basis of a collateral attack on a judgment reciting due and legal service of citation by publication. In *State Mortgage Corporation v. Affleck et al.* (Tex. Com. App.), 51 S.W. 2d 274, the Court stated it appeared that affidavit for citation by publication was not strictly in accordance with the provisions of the law but, nevertheless held:

> ". . . since that judgment recites that the defendants had been *duly cited by publication*, it must be presumed, as a matter of law, that the defendants were duly cited. The recital in the judgment, which was the last act of the Court in that case, reciting that

> 'the defendants, although *duly cited by publication*, came not, but wholly made default,' imports, in collateral proceedings, absolute verity." (Emphasis added).

Another case in point is *Chapman v. Kellogg* (Tex. Com. App. - Approved by Supreme Court), 252 S.W. 151, in which it was urged that a judgment was void on the ground, among others, that "there was never any proper affidavit on which citation by publication could have been made." The Court held (159):

> ". . . This is a collateral attack upon a judgment of a Court of competent jurisdiction. The judgment on its face recites due and legal service of citation. These recitals in the judgment in collateral attack cannot be contradicted by other portions of the record. The judgment in this respect imports absolute verity. . ."

The Court of Appeals held that the rule of absolute verity cannot be imposed as to a nonresident defendant to prevent an inquiry into the record facts showing that nonresident service was not legally obtained. The Texas Courts make no distinction between residents of Texas and nonresidents of Texas insofar as applying the rule of absolute verity is concerned. No good reason appears why there should be any distinction.

The case of *Loper v. Meshaw Lumber Company* (Tex. Civ. App. - err. dis.), 104 S.W. 2d 597, was a suit in trespass to try title in which a tax judgment was attacked. One of the defendants in the tax judgment was H. T. Hatton, a resident of California, and the judgment in the tax case recited that he had been "duly and legally served with citation in this cause by publication." It was claimed that the tax judgment was void (1) because there was

no affidavit showing that H. T. Hatton was a non-resident of this State such as would authorize the issuance of a citation by publication, and (2) because the citation was defective inasmuch as it was not published the requisite number of times. In disposing of these contentions, the Court said (599):

> "Contentions 1 and 2 above must be overruled because each involves a simple collateral attack on the judgment of the court of general jurisdiction. As pointed out in a previous part of this opinion, the judgment which appellant would attack recites due and legal service. To rebut this recital in the judgment would involve the contradiction of the judgment record, and the verity of such judgment may not thus be challenged in a collateral attack."

As authority for the above holding, the opinion cites many cases in which the various Appellate Courts of Texas have held that as against a collateral attack jurisdictional recitals in a judgment import absolute verity and cannot be impeached.

It is submitted that the Court of Appeals erred in its holding that the application of the rule of absolute verity in this case would be a denial of the Constitutional provision of the process. The defendant in a suit wherein the process is by publication is permitted by Rule 329,[8] Texas Rules of Civil Procedure, in cases where the defendant has not appeared in person nor by an attorney of his selection, to file Motion for New Trial within two years after the rendition of a judgment in such case. Such defendant or defendants may also bring a direct attack for setting aside such judgment within four years

[8] Set out in full at App. page 5.

under the provisions of Article 5529 of the Civil Statutes of Texas.[6] When such procedures are availed of the rule of absolute verity may not be interposed as a bar. These provisions of the law provide legal means and ways of combatting and setting aside a judgment that should not have been rendered in the first instance. Surely, it cannot be said that due process of law is denied to defendants in publication cases when such procedures for directly attacking judgments in publication cases have been provided.

That the doctrine of absolute verity is the law in Texas and, in a collateral attack such as this, prevents the impeachment of jurisdictional recitals in a judgment of a Court of competent jurisdiction by other parts of the record is so firmly established by the decisions of the Texas Courts that it is not open to question. The Texas Courts have uniformly adhered to such rule and doctrine for many years. With reference to the doctrine, the Supreme Court of Texas in *Levy v. Roper*, 113 Tex. 356, 256 S.W. 251, 253, said the following:

> "The necessity for maintaining rights acquired on the faith of apparently valid judgments of domestic courts of general jurisdiction has led to the rule, now firmly established in Texas, that whenever such judgments are collaterally assailed their jurisdictional recitals are not open to attack but import absolute verity. . . ."

The Supreme Court of Texas, in the case of *Williams v. Hays*, 77 Texas 283, 13 S.W. 1029, 1030, states the rule as follows:

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[6] Set out in full at App. page 5.

". . . It is settled that a judgment of a court of competent jurisdiction cannot be collaterally impeached unless the record affirmatively shows the want of jurisdiction. Even where a part of the record, the citation and its return, show that service could not have been had, the judgment of a justice of the peace reciting that the defendant wholly made default, and that he 'was duly served with process,' was held not impeached. The judgment being the final act of the court, its judicial finding imported absolute verity. Evidence of fraud aliunde the record cannot be heard to dispute the judgment even where the fraud is in obtaining jurisdiction. . . ."

The very recent case of *Bemis v. Bayou Development Company*, (Tex. Civ. App.-er. ref.) 184 S.W. 2d 645, in which Certiorari was denied by this Honorable Court, 66 S. Ct. 43, 326 U.S. 681, 90 L. Ed. 398, is very much in point and plainly states the rule of absolute verity as Petitioners contend for in this case. Such case was brought by Bemis to recover title to land that he had formerly owned and which had been sold under a foreclosure judgment rendered against Bemis some eleven years before he filed the title suit. He attacked the foreclosure judgment on the ground that it was void because the pleadings and the citation in the case contradicted the jurisdictional recitals in such judgment. It appears from the opinion that such pleadings and other papers in the case did actually show that the defendant was not served with citation by publication in accordance with the Texas Statutes, which was the only legal way in which he could have been cited under the then existing law of Texas. In holding that in such collateral attack on the foreclosure judgment, the pleadings, citation and other papers were not admissible to impeach the jurisdictional recitals in the judgment, the Court said (648):

"In other words, this court fails to join the appellant in finding any fundamental error apparent upon the face of the foreclosure judgment, but contrarily, is constrained to hold that its *given recitals, as against the collateral attack herein made thereon, imported absolute verity to the extent that the pleadings, the citation, and other court papers appertaining thereto, cannot be looked to for any contradiction thereof*, and that, in consequence, this controversy ends there; such is the law of Texas, as is made manifest by these authorities; Empire Gas and Fuel Co. v. Albright, 126 Tex. 485, 87 S.W. 2d 1092; Levy v. Roper, 113 Tex. 356, 256 S.W. 251; Brown v. Clippinger, 113 Tex. 364, 256 S.W. 254; Hopkins v. Cain, 105 Tex. 591, 143 S.W. 1145; Martin v. Burns, 80 Tex. 676, 16 S.W. 1072; Chapman v. Kellog, Tex. Com. App., 252 S.W. 151; Pure Oil Co. v. Reece, 124 Tex. 476, 78 S.W. 2d 932; Hartel v. Dishman, 135 Tex. 600; 145 S.W. 2d 865; Wixom v. Bowers, Tex. Com. App., 152 S.W. 2d 896, writ refused for want of merit; Switzer v. Smith, Tex. Com. App., 300 S.W. 31, 68 A.L.R. 377 et seq.; Treadway v. Eastburn, 57 Tex. 209; Crawford v. McDonald, 88 Tex. 626, 33 S.W. 326. (Emphasis added)."

The Court of Appeals for the Fifth Circuit has applied the rule of absolute verity many times, representative cases being:

Bostwick, et al. v. Baldwin Drainage District, et al, 133 F. 2d 1;
Hudson v. Lewis, 188 F. 2d 679;
Cox, et al v. Kirby Lumber Corporation, et al, 197 F. 2d 812;
King v. Hester, 200 F. 2d 807.

We believe that the holding of this Honorable Court in *Erie v. Tompkins*, 304 U.S. 64, 58 S. Ct. 817, requires the

Courts of the United States to follow the law of Texas in this case. If the law of Texas is followed the collateral attack on the State Court judgments must fail and the judgments must be upheld. This is as it should be. There should be, after the lapse of time, a finality to judgments and particularly to judgments adjudicating title to land.

The doctrine or rule of absolute verity has become and is a rule of property in Texas. Attorneys examining title to real property do not go behind the jurisdictional recitals in judgments more than four years old because our Supreme Court and Courts of Civil Appeals have said that after the lapse of such time such recitals cannot be impeached. We earnestly submit that much more is involved here than the subject matter of this suit and that the questions in this case are of the utmost importance.

2. The Court of Appeals held that the failure of John R. Bevil on the trial of the State Court suits to introduce in evidence the instruments through and under which Respondents herein, defendants in such State suits, claimed title, namely, three deeds and three releases of vendor's lien from John R. Bevil to Texas Little Farms Company and deeds from Texas Little Farms Company to Respondents, was legal fraud that may be availed of by Respondents to set aside such judgments; further, that the failure of Bevil to set forth in his pleadings in the State Court suits such deeds and releases was such intentional misleading action as may be the basis to set aside the judgments for fraud. The Court held that Bevil was guilty of fraud and that such fraud required the setting aside of such judgments. This holding is contrary to the State law of Texas and involves an important State question.

The State Court suits were suits in trespass to try title, which action is provided for by Art. 7364 of *Vernon's Annotated Texas Statutes* (App. page 1). They were not suits to set aside deeds or to remove cloud from title as was stated several times in the majority opinion. The requisites of Plaintiff's Petition are covered by Rule 783, *Texas Rules of Civil Procedure* (App. page 1). Rule 783 does not require the plaintiff in such action to plead his title or to set forth in his pleadings any deeds or other instruments that he might have executed that might affect such title. Plaintiff's Petition in *Bevil v. Chivers*, No. 8299, is shown as Exhibit H and Plaintiff's Petition in *Bevil v. Johnson*, No. 8471, is shown as Exhibit 1 attached to Plaintiffs' Answer to Defendants' First Amended Motion to Dismiss, the original of which Answer was sent up with the record in this case. The Petitions in both of the State Court suits strictly comply with Rule 783 of the *Texas Rules of Civil Procedure*.

Rule 800, *Texas Rules of Civil Procedure* (App. page 2), provides that where the defendant has been cited by publication and fails to appear and answer by himself, or by attorney of his own selection, "the *plaintiff shall make such proof as will entitle him prima facie to recover* whereupon the proper judgment shall be entered" (emphasis added).

Rule 244, *Texas Rules of Civil Procedure* (App. page 4), provides that where service has been by publication and no answer has been filed nor appearance entered the Court shall appoint an attorney to defend the suit in behalf of the defendant. Such was done in both of the State Court suits.

Rule 812, *Texas Rules of Civil Procedure* (App. page 4), provides that no judgment by default shall be taken in

a case where service is by publication and that the facts entitling the plaintiff to judgment shall be exhibited to the Court on the trial. This Rule was complied with in the State Court suits.

We have found no case that requires the plaintiff, in a suit where service has been obtained by publication, to do more than was done by the plaintiff in the State Court suits here under attack. We have found no authority that requires the plaintiff in such a suit to do more than introduce evidence establishing a prima facie case. We have found no authority that requires a plaintiff in such case to introduce instruments under and through which the defendants in such case might be claiming title.

In his dissenting opinion, Chief Judge Hutcheson said the following (App. page 59-60):

> "Other holdings of the court from which I dissent as in complete contradiction of the statutes of Texas and the decisions thereunder are: (1) that there was a violation of the Texas statutes in the failure of the plaintiffs in their petition in the publication suits to plead their titles specifically; (2) that their failure to introduce in evidence or otherwise bring up for adjudication in the publication suits the validity vel non and the effect of the instruments, the existence of which had caused them to institute the suits, constituted fraud requiring the setting aside of the judgments.
>
> "As clearly appears in the statutes and rules, the requirement for pleading title specifically, though at one time existing, had been repealed long before the suits here involved were brought. The applicable statutes and rules governing publication suits specifically provide that plaintiffs are required only to show a

prima facie title and no decision in Texas has ever held, nor under the law could hold, that the failure to offer evidence as to the defendants' claim of title constituted fraud."

It is submitted that John R. Bevil did all the Texas law required him to do in pleading and making proof in the State Court suits and that the Court of Appeals wrongfully found him guilty of fraud and committed error in setting aside the judgments on the ground of fraud.

3. The Court of Appeals held that the affidavit for citation by publication in the case of *Bevil v. Chivers, et al.*, No. 8399, was not in compliance with the rule relating to such matter because such affidavit was made two days before the suit was instituted, and further held that such failure to comply with the rule vitiated the entire proceedings, since there could be no legal citation and publication absent a legal affidavit. In this holding the Court of Appeals has decided an important State question in a way in conflict with applicable State law.

Assuming, for the purpose of this point, that the affidavit for citation by publication could be examined and looked to in this collateral attack on the judgment in the *Chivers* case, and assuming further that the affidavit introduced in evidence in this case was the very affidavit upon which citation by publication was predicated, the fact that the affidavit was made two days before the filing of the suit does not show non-compliance with the rule relating to affidavits for citation by publication in view of the pleadings and the stipulations by the pleadings in this case. The Court of Appeals held contrary to the Texas case of *Durst v. Park* (Tex. Civ. App.), 177 S.W. 2d 301. In such case the affidavit for citation by publication was made one day

before the suit was filed. In the course of the opinion the Court said:

> "The sole point presented by this appeal is that the affidavit did not authorize the clerk to issue citation by publication because it was not made when the suit was instituted or at any time during its progress, as required by Rule 109, Texas Rules of Civil Procedure, but was made prior to the institution of the suit, and that therefore the judgment rendered against defendants, who did not answer except by an attorney appointed by the Court, was void.
>
> "Plaintiff alleged 'that the residences and places of residence of the several defendants . . . and each and all of them, are unknown to plaintiff and to her attorneys,' and this allegation was verified by the affidavit. It was stipulated that these alleged facts were true at the time the affidavit was made and at the time the suit was filed and citation issued. There is no contention that the facts alleged did not authorize the issuance of citation by publication under Rule 109, R.C.P.
>
> "In Kitchen v. Crawford, 13 Tex. 516, at p. 520, the Supreme Court said: 'It is not the making of the affidavit but the truth of it, that is the existence in fact of the assumed condition, which enables the Court to acquire jurisdiction over the person of the defendant by publication.'
>
> ". . . We think it clear, however, that in view of the objective of the Rules of Civil Procedure, promulgated and adopted by the Supreme Court, as set out in Rule 1 that Rule 109 should not be given the limited and narrow construction for which appellants contend. . . . The ground of issuance of the citation was that the residence or residences of the several defendants were unknown to plaintiff and to her at-

torneys. This factual basis for issuance of citation is not of a nature so inherently changeable as to lead to the supposition that it had ceased to exist within the brief space of time which elapsed between the making of the affidavit and the filing of the petition in this case. . . ."

The Court held that the affidavit authorized the issuance of the citation and upheld the judgment predicated upon such citation by publication.

In the case at bar the affidavit states that the defendants in the *Chivers* case "are non-residents of the State of Texas." It is alleged in Plaintiffs' First Amended Original Complaint in this case that plaintiffs "were non-residents of Texas at the time they purchased the land in 1924 and 1925 and have continuously been non-residents thereafter down to the present time and at the time the said two suits were filed" (Tr. of R. 17). The two suits referred to were, of course, the suit of *Bevil v. Chivers* and the suit of *Bevil v. Johnson*. There are also allegations in Paragraphs 15 through 34 of the Complaint to the effect that the plaintiffs, and those through whom they claim, were non-residents of the State of Texas long prior to and at the time the suit of *Bevil v. Chivers* was filed. Defendants admitted that all of the parties defendant in the cases of *Bevil v. Chivers* and *Bevil v. Johnson* were non-residents of Texas. It follows, therefore that not only have the plaintiffs alleged facts showing that the defendants in the Chivers suit were non-residents of Texas, at the time the suit was filed, thus substantiating the truthfulness of the fact alleged in the affidavit for citation by publication, as of the very day the suit was filed, but such fact is taken as proved by the admission of defendants in their pleadings in response to the pleadings of plaintiffs. Thus, the facts in this case

bring it squarely within the facts in the *Durst* case and make the holding in that case applicable to the case at bar. It is submitted that if defendants in the *Chivers* case were non-residents on the date the affidavit was made, it is very unlikely that their status would have changed to residents of the State by two days later. Thus, again, the *Durst* case is squarely in point.

4. The Court of Appeals held that the burden was on Petitioners, as defendants pleading the bar of the four year statute of limitations of the State of Texas, to prove that Respondents knew, or ought to have known, of the State Court judgments (and presumably, of course, of the fraud alleged by Respondents to have been perpetrated by John R. Bevil in obtaining such judgments) more than four years before this suit was filed and that because Respondents did not make such proof there was no merit to their contention that this action was barred by the four year statute of limitations. Such holding is contrary to the uniform holdings of the State Courts of Texas on this important State question.

The Court of Appeals, as authority for such holding, cited *Harrison v. Orr* (Tex. Com. App.), 296 S.W. 871, and quoted therefrom the following (873):

> "Manifestly the burden of proving that essential fact was upon Harrison (the party pleading the statutory bar) unless through evidence produced in his own behalf Orr (the party sought to be barred) proved it for him."

Such holding was limited and modified by the Commission of Appeals in its opinion on Motion for Rehearing at 10 S.W. 2d 381, 382, as follows:

"The statement about burden of proof in the fifth paragraph of our (original) opinion ought (to) be considered as having relation to the exact case made, and not an hypothetical one. *The question before us was whether Harrison was entitled to a peremptory instruction, and we held that he did not have that right, because he had not destroyed the effect of the evidence making a jury issue.*" (Emphasis added)

Thus it will be seen that the *Harrison* case is not authority for the holding of the Court of Appeals because such case merely held, as shown by the opinion on rehearing, that Harrison was not entitled to a peremptory instruction on the statute of limitations because "he had not destroyed the effect of the evidence making a jury issue."

Respondents alleged that they "first learned of the rendition of the judgments in suits Nos. 8399 and 8471 less than four years before the filing of this suit" (Tr. of R. 16). Petitioners, by way of answer thereto, denied the above and foregoing allegation (Tr. of R. 82).

Under the uniform decisions of Texas Courts the burden was on Respondents to both allege and prove that they did not know of the entry of the judgments and the alleged fraud, and by the use of reasonable diligence could not have learned about such matters, until less than four years before this suit was filed. The Texas authorities discussed below clearly set out the rule which the Texas Courts have always adhered to, viz, that one who attempts to bring himself within a saving exception to the statute of limitations, so as to toll the running of the statute, has the burden of proving facts coming within the exception.

In the case of *Childress, et al. v. Grim*, 57 Tex. 56, 59, the Supreme Court of Texas said:

> "The correct practice, in cases where the defendant pleads the statute, would seem to be for the plaintiff to set up in reply any disability which may take his case out of its operation. Otherwise he will not be permitted to prove the disability because it has not been alleged. In such case the defendant has only to prove the truth of his plea and his defense is complete. . . ."

In *Raley, et al. v. D. Sullivan & Co., et al.*, 207 S.W. 906, 908, the Commission of Appeals of the Supreme Court of Texas thus stated the rule:

> ". . . The burden was on Sullivan & Co. to show the fraudulent concealment, their ignorance of the facts and that they could not by reasonable diligence have sooner discovered the alleged fraud . . ."

In *Logan v. Taylor* (Tex. Civ. App. - err. ref.), 118 S.W. 2d 1094, there was a cross-action seeking to rescind a contract of purchase based on alleged fraud inducing its execution. The four year statute of limitations was interposed as a bar to such cross-action. The Court held as follows:

> ". . . And six years and more than seven months having elapsed, it was necessary for Appellee to allege and prove facts which would toll the running of limitation for the excess period from March 31, 1930 to November 9, 1932; that is, Appellee was required to allege and prove facts which would have excused an ordinarily prudent person from discovering the alleged fraud during the excess period in the exercise of reasonable diligence . . ."

In the case of *La Neve v. Hinkson et al.* (err. ref. - n.r.e.), 271 S.W. 2d 467, 471, the Court said:

> "We take it to be unquestioned that where there is an allegation of fraud or mistake and the statute of limitation has been plead, the one making such allegation must prove that due diligence was exercised to detect same, to avoid the running of the statute . . ."

There was no evidence that Respondents did not know, and by exercise of due diligence would not have known, of the judgments (and the alleged fraud, if any there was) more than four years before the filing of this suit. There were circumstances from which it could be found that they did know, or should have known, of the judgments more than four years before the filing of this suit. The Trial Court found that they did so know, or should have so known (App. page 29), and concluded that the four year statute was a bar to every cause of action asserted by them in this suit (App. page 30).

It is submitted that the burden was on Respondents to allege and prove facts tolling the four year statute of limitations, that they wholly failed to do so and that the Texas authorities hereinabove cited and quoted from are decisive of this matter and that the Court of Appeals, in holding to the contrary, has decided an important State question in a way in conflict with applicable State law.

## CONCLUSION

We regret that this Petition has been extended to this length but due to the importance of the questions involved, as we view them, and to what we sincerely believe to be numerous erroneous holdings by the Court of Appeals, we feel that this case should have a full presentation to this Honorable Court.

Petitioners respectfully submit that:

(1) The District Court did not have jurisdiction of this case because there was no showing that the amount in controversy exceeds the sum or value of $3,000.00; alternatively, such Court did not have jurisdiction as to the claim of any of the Respondents except Respondents Alexander Luckanick, et al.

(2) The holding of the Court of Appeals that to apply the doctrine of absolute verity in this case would be a denial of due process of law is in conflict with the decision of this Court in *Hall v. Law*, 102 U.S. 217.

(3) The rule of absolute verity should be applied in this case.

(4) No fraud in connection with the State Court suits has been shown.

(5) The affidavit for citation by publication in the case of *Bevil v. Chivers* was and is in compliance with the law relating to such matter.

(6) Respondents Alexander Luckanick, et al., assert title to land they contend is within the boundaries of the land involved in *Bevil v. Chivers*, No. 8399, (Tr. of R. 26). We believe it demonstrated herein that, in any event, the procedure in that case was and is in compliance with applicable law and such judgment is a valid judgment. Therefore, such Respondents failed to establish a cause of action against Petitioners.

(7) The four year statute of limitations was and is a bar to every cause of action asserted by Respondents in this case.

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

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**Proof of Service**

I, William Hamlet Blades, Attorney for Petitioners herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 16th day of January, 1959, I served copies of the foregoing Petition for Writ of Certiorari on Respondents by mailing copies thereof in duly addressed envelopes, with postage prepaid, to their Attorneys of record as follows:

Honorable R. F. Roberts
420 Goodhue Building
Beaumont, Texas

Honorable Hugh Freeland
Kaufman Trust Building
Beaumont, Texas

W. H. Blades

# APPENDIX A

## TEXAS STATUTES AND RULES OF CIVIL PROCEDURE

Article 7364. 7731, 5248, 4784 Method of trying titles

All fictitious proceedings in the action of ejectment are abolished. The method of trying titles to lands, tenements or other real property shall be by action of trespass to try title. Act. Feb. 5, 1840; G. L. Vol. 2, P. 310.

Rule 783. Requisites of Petition (Trespass to Try Title).

The petition shall state:

(a) The real names of the plaintiff and defendant and their residences, if known.

(b) A description of the premises by metes and bounds, or with sufficient certainty to identify the same, so that from such description possession thereof may be delivered, and state the county or counties in which the same are situated.

(c) The interest which the plaintiff claims in the premises, whether it be a fee simple or other estate; and, if he claims an undivided interest, the petition shall state the same and the amount thereof.

(d) That the plaintiff was in possession of the premises or entitled to such possession.

(e) That the defendant afterward unlawfully entered upon and dispossessed him of such premises, stating the date, and withholds from him the possession thereof.

(f) If rents and profits or damages are claimed, such facts as show the plaintiff to be entitled thereto and the amount thereof.

(g) It shall conclude with a prayer for the relief sought.

Rule 109. Citation by Publication

Where a party to a suit, his agent or attorney, shall make oath when the suit is instituted or at any time during its progress, that any party defendant therein is a non-resident of the State, or that he is absent from the State, or that he is a transient person, or that his residence is unknown to affiant, the clerk shall issue a citation for such defendant for service by publication.

(Note: Rule 109 has been amended effective as of February 1, 1946, but the above is the wording of the Rule on the dates pertinent to this suit).

Rule 115. Form of Published Citation in Actions Involving Land

In citations by publication involving land, it shall be sufficient in making the brief statement of the claim in such citation to state the kind of suit, the number of acres of land involved in the suit, or the number of the lot and block, or any other plat description that may be of record if the land is situated in a city or town, the survey on which and the county in which the land is situated, and any special pleas which are relied upon in such suit.

Rule 800. Proof Ex Parte

If the defendant has been cited only by publication, and fails to appear and answer by himself, or by attorney of his own selection, or if any defendant, having answered, fails to appear by himself or attorney when the case is called for trial on its merits, the plaintiff shall make such proof as will entitle him prima facie to recover, whereupon the proper judgment shall be entered.

Article 1975. 2172, 1504 Actions Maintainable

Persons claiming a right to or interest in property in this State may bring and prosecute to final decree, judg-

ment or order, actions against non-residents of this State, or persons whose place of residence is unknown, or who are transient persons, who claim an adverse estate, or interest in, or who claim any lien or incumbrance on said property, for the purpose of determining such estate, interest, lien, or incumbrance, and granting the title to said property, or settling the lien or incumbrance thereon. Acts. 1893, p. 77; G. L. vol. 10, p. 507.

Article 1976. 2173, 1504 Actual possession not necessary

Such action as provided for in Article 1975, Title 42, Chapter 1, of the 1925 Revised Civil Statutes, of the State of Texas, may be maintained by any such person whether or not he is in actual possession of such property. Service on the defendant or defendants may be made by publication as is now or may be hereafter provided by law for publication of citation against such defendants, or by service of notice of the character and in the manner provided for by Articles 2037 and 2038, of Title 42, Chapter 3, of the 1925 Revised Civil Statutes, of the State of Texas. Acts. 1893, p. 77; G. L. vol. 10, p. 507; Acts 1934, 43rd Leg., 4th C. S., p. 68, ch. 26, Sec. 1.

Rule 810. Requisites of Pleadings

The petition in actions authorized by Article 1975 of the 1925 Revised Civil Statutes shall state the real names of the plaintiff and defendant, and shall describe the property involved with sufficient certainty to identify the same, the interest which the plaintiff claims, and such proceedings shall be had in such action as may be necessary to fully settle and determine the question of right or title in and to said property between the parties to said suit, and to decree the title or right of the party entitled thereto; and the court may issue the appropriate order to carry such decree, judgment or order into effect; and whenever such petition has been duly filed and citation thereon has been duly served by publication as required by Rules 114-116, the plaintiff may, at any time prior to entering

the decree by leave of court first had and obtained file amended and supplemental pleadings that do not subject additional property to said suit without the necessity of reciting the defendants so cited as aforesaid.

Rule 811. Service by Publication in Actions under Article 1975

In actions authorized by Article 1975 of the 1925 Revised Civil Statutes of the State of Texas, service on the defendant or defendants may be made by publication as is provided by Rules 114-116 or by service of notice of the character and in the manner provided by Rule 108.

Rule 244. On Service by Publication

Where service has been made by publication, and no answer has been filed nor appearance entered within the prescribed time, the court shall appoint an attorney to defend the suit in behalf of the defendant, and judgment shall be rendered as in other cases; but, in every such case a statement of the evidence, approved and signed by the judge, shall be filed with the papers of the cause as a part of the record thereof. The court shall allow such attorney a reasonable fee for his services, to be taxed as part of the costs.

Rule 812. No Judgment by Default

No judgment by default shall be taken in such case, but the facts entitling the plaintiff to judgment shall be exhibited to the court on the trial; and a statement of facts shall be filed as provided by law and these rules in suits against non-residents of this State where no appearance has been made by them.

(Note: Rule 812 has been amended effective as of March 1, 1950, but the above is the wording of the Rule on the dates pertinent to this suit).

Rule 329. Motion for New Trial on Judgment Following Citation by Publication

In cases in which judgment has been rendered on service of process by publication, where the defendant has not appeared in person or by attorney of his own selection:

(a) The Court may grant a new trial upon petition of the defendant showing good cause, supported by affidavit, filed within two years after such judgment was rendered. The parties adversely interested in such judgment shall be cited as in other cases.

(Note: Subdivisions (b) and (c) of Rule 329 are not pertinent and are not copied here).

Article 5529. (5690) (3358) (3207)

Every action other than for the recovery of real estate, for which no limitation is otherwise prescribed, shall be brought within four years next after the right to bring the same shall have accrued and not afterward.

## APPENDIX B

### DEFENDANTS' FIRST AMENDED MOTION TO DISMISS

In The
**UNITED STATES DISTRICT COURT**
For the Eastern District of Texas
Beaumont Division

| | | |
|---|---|---|
| MARGARET O'BOYLE, ET AL | § | CIVIL ACTION |
| VS. | § | FILE NO. 3296 |
| JOHN R. BEVIL, JR., ET AL | § | |

TO SAID HONORABLE COURT:

Now come John R. Bevil, Jr., A. L. Bevil, Maud Bevil Black, Etoile Bevil, Constance B. McElroy, Dr. F. B. Hart, Mary Louise McKee and husband, Clyde V. McKee, and Vada K. Bevil, being all of the defendants named in Plaintiffs' Original Complaint, and with leave of the court first obtained, file this Defendants' First Amended Motion to Dismiss, moving this court to dismiss this action for the following reasons and upon the following grounds:

I.

To dismiss this action on the ground of failure to join an indispensable and real party in interest, namely, R. F. Roberts. He is in privity with the present Plaintiffs against whom the State Court judgments, hereinafter referred to, were rendered, which judgments Plaintiffs now seek to impugn.

Filed herewith and attached hereto as Exhibit A[1] is certified copy of judgment of the District Court of Hardin

County, Texas, in Cause No. 8399, styled John R. Bevil vs. A. L. Chivers, et al, recorded in the Minutes of said court, Volume 9, page 8 et seq., and dated August 29, 1945.

Filed herewith and attached hereto as Exhibit B[2] is certified copy of judgment of the District Court of Hardin County, Texas, in Cause No. 8471, styled John R. Bevil vs. W. S. Johnson, et al, recorded in the Minutes of said Court, Volume 9, Page 24, et seq., and dated January 7, 1946.

After such judgments were entered, but prior to the commencement of this present suit, R. F. Roberts obtained deeds from the following named persons, dated as indicated below, recorded in the Deed Records of Hardin County, Texas, as indicated below, and purporting to convey certain tracts of the G. M. B. Hawley Subdivision of the Joel Edwin Hawley League according to the plat recorded in Volume 22, Page 92 of the Deed Records of Hardin County, Texas, designating tract numbers and such deeds as indicated below:

a. Deed dated October 16, 1952, filed November 7, 1952, recorded Volume 259, Page 92, Deed Records of Hardin County, Texas, from Margaret O'Boyle, Tract No. 114, grantor reserving 3/4 of the minerals. A certified copy of such deed is filed herewith, marked Exhibit C-1, and made a part hereof.[3]

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1 and 2 not copied in this Appendix since copies of both judgments appear in Appendix C.

[3] Exhibit C-12 is copied in this Appendix. Exhibit C-1 through C-15, with the exception of C-12, are not copied herein, same being deeds to R. F. Roberts and being in substantial form as Exhibit C-12.

b. Deed dated June 30, 1951, filed for record August 8, 1952, recorded Volume 254, Page 520, Deed Records of Hardin County, Texas, from Joseph A. Bodie, Jr., Tract 67, save and except 9/16 of the minerals. A certified copy of such deed is filed herewith, marked Exhibit C-2, and made a part hereof.

c. Deed dated September 18, 1952, filed for record November 7, 1952, recorded Volume 259, Page 100, Deed Records of Hardin County, Texas, from Ann Bodie Ward and husband, Sherman Ward, 1/2 undivided interest in Tract 67, save and except 6/8 of the minerals. A certified copy of such deed is filed herewith, marked Exhibit C-3, and made a part hereof.

d. Deed dated September 30, 1952, filed for record November 7, 1952, recorded Volume 259, Page 109, et seq., Deed Records, Hardin County, Texas, from Alexander Luckanick, Christine Luckanick, John Luckanick, Ann Sviatyla and husband, Metry Sviatyla, Evelyn Seaman and husband, Walter Seaman, Julia Rogalavich and husband, Mike Rogalavich, Jennis Bennett and husband, Harold A. Bennett, Mary Simmons and husband, Henry Simmons, an undivided 1/9 of 7/8 of the minerals, Tracts 70, 71, 72, 98 and 99, and leasing the surface rights thereon to Roberts for a period of 15 years from September 30, 1952, with Roberts agreeing to pay all back taxes and keep the taxes paid during the leasing period and agreeing "to do all legal work necessary to clear the title to said land. Grantee shall have the option to purchase said land if same is offered for sale, and to renew the lease at the end of the leasing period." A certified copy of such deed is filed herewith, marked Exhibit C-4, and made a part hereof.

e. Deed dated September 24, 1952, filed November 7, 1952, recorded Volume 259, Page 102, Deed Records

of Hardin County, Texas, from C. M. Shreiner and wife, Lillian Schreiner, Tract No. 73, grantor reserving 6/8 of the minerals. A certified copy of such deed is filed herewith, marked Exhibit C-5, and made a part hereof.

f. Deed dated September 2, 1952, filed August 18, 1953, recorded Volume 272, Page 135, Deed Records of Hardin County, Texas, from I. Feuer, Tract No. 92, grantor reserving 4/5 of the minerals. A certified copy of such deed is filed herewith, marked Exhibit C-6, and made a part hereof.

g. Deed dated July 21, 1952, filed August 8, 1952, recorded Volume 254, Page 506, Deed Records of Hardin County, Texas, from T. Herbert Johnson, Tract No. 97, grantor retaining 3/4 of the minerals. A certified copy of such deed is filed herewith marked Exhibit C-7, and made a part hereof.

h. Deed dated August 30, 1952, filed November 30, 1954, recorded Volume 295, Page 398, Deed Records of Hardin County, Texas, from Emma T. (Mrs. Robert J.) Miller, Tract 102, grantor reserving 3/4 of the minerals. A certified copy of such deed is filed herewith, marked Exhibit C-8, and made a part hereof.

i. Deed August 20, 1952, filed November 30, 1954, recorded in Volume 295, Page 400, Deed Records of Hardin County, Texas, from O. M. Hazelton, undivided 1/2 Tract 110, grantor reserving 3/4 of the minerals. A certified copy of such deed is filed herewith, marked Exhibit C-9, and made a part hereof.

j. Deed dated August 21, 1952, filed November 7, 1952, recorded Volume 259, Page 99, Deed Records of Hardin County, Texas, from Edward Armstrong, undivided 1/2 Tract 110, grantor reserving 3/4 of the minerals. A certified copy of such deed is filed herewith, marked Exhibit C-10, and made a part hereof.

k. Deed dated August 22, 1951, filed August 8, 1952, recorded Volume 254, Page 475, Deed Records, Hardin County, Texas, from Anna Berger and Jonas Berger, Tract No. 112, grantors reserved 4/5 of minerals. A certified copy of such deed is filed herewith, marked Exhibit C-11, and made a part hereof.

l. Deed dated August 2, 1951, filed August 8, 1952, recorded in Volume 254, Page 518, Deed Records of Hardin County, Texas, from A. D. Davees and Mame C. Davies, Tracts 113, 115, 116, grantors reserved 9/16 of minerals. A certified copy of such deed is filed herewith, marked Exhibit C-12, and made a part hereof.

m. Deed dated October 14, 1952, filed for record November 7, 1952, recorded in Volume 259, Page 97, Deed Records of Hardin County, Texas, from H. W. Koch and wife, Lillian B. Koch, Robert W. Carter and wife, Marion E. Carter, an undivided 1/2 of Tract 143, grantors reserving 3/4 of the minerals. A certified copy of such deed is filed herewith, marked Exhibit C-13, and made a part hereof.

n. Deed dated January 10, 1952, filed August 8, 1952, recorded Volume 254, Page 491, Deed Records of Hardin County, Texas, from W. E. Lukens, Tract No. 178, grantors reserving 9/16 of the minerals. A certified copy of such deed is filed herewith, marked Exhibit C-14, and made a part hereof.

o. Deed dated November 18, 1952, filed December 3, 1952, recorded in Volume 260, Page 429, Deed Records, Hardin County, Texas, from Dr. C. A. Craig, Tract 199, 3/4 of minerals reserved. A certified copy of such deed is filed herewith, marked Exhibit C-15, and made a part hereof.

All exhibits are attached hereto.

Each and all of said deeds hereinabove listed, as well as the descriptions used in Plaintiffs' Original Complaint, describe the various tracts according to the map of a subdivision of the said Joel E. Hawley League of record in Volume 22, page 92 of the Deed Records of Hardin County, Texas, and there is filed herewith a certified copy of such map, marked Exhibit C-16, attached hereto and made a part hereof.

From the foregoing, it appears that each and all of the Plaintiffs in this present suit except Sadie E. Gromlich, W. J. Brong, Ervin Brong, Harvey Brong, Charles Brong and Elmer Brong, have executed deeds in favor of R. F. Roberts, purporting to convey the lands or substantial parts thereof, which are respectively alleged in their complaint to be owned by them, Thus R. F. Roberts is one whose interest is directly affected, Under the jurisprudence of the State of Texas said R. F. Roberts is a necessary or indispensable party. So is he an indispensable and a real party in interest to the present action in this court.

II.

To dismiss this action because R. F. Roberts is an indispensable party to this suit as a party plaintiff and this court cannot entertain this action without said R. F. Roberts being joined herein, and once joined the court is again without jurisdiction since he is a citizen of the State of Texas and is not capable of suing these defendants, who are also citizens of the State of Texas, in this court, because there is no diversity of citizenship between R. F. Roberts and these defendants. The supporting affidavit as to the citizenship of the defendants and R. F. Roberts is attached hereto, made a part hereof and marked Exhibit D.

III.

To dismiss this action because the amount actually in controversy is less than Three Thousand and No/100 ($3,000.00) Dollars, exclusive of interest and costs. The claims of the several Plaintiffs in this action are separate and distinct, and each of the claims must exceed Three Thousand Dollars in order to invoke the jurisdiction of this court. There is no allegation in the Complaint that the amount in controversy with respect to the claim of any single alleged cause of action exceeds Three Thousand Dollars.

Plaintiffs Joseph A. Bodie, Jr. and Ann Bodie Ward, joined by husband, Sherman Ward (to the exclusion of the other Plaintiffs), claim title to "Tract No. 67 embraced in Suit No. 8399" (quoting from Plaintiffs' Original Complaint, Paragraph 13). Said Tract No. 67 is far less than $3,000.00 in value.

Plaintiffs Barbara Ferber, Grace Hanlon, Sara Mole and husband, Herbert Mole, and Walter Synar (to the exclusion of the other Plaintiffs), claim title to "Tract No. 68, of the said G. M. B. Hawley Subdivision embraced in said Suit No. 8399" (quoting from Plaintiffs' Original Complaint, Paragraph 14). Said tract No. 68 is far less than $3,000.00 in value.

Plaintiffs Alexander Luckanick, Christine Luckanick, John Luckanick, Anna Luckanick Sviatyla and husband, Metry Sviatyle, Evelyn Luckanick Seaman and husband, Walter Seaman, Julia Luckanick Rogalenick and husband, Mike Rogalenick, Jennie Luckanick Bennett and husband Harold A. Bennett, and Mary Luckanick Simmons and husband, Henry Simmons (to the exclusion of the other

Plaintiffs), claim ownership of Tracts numbered 70, 71, 72, 98, and 99, of the G. M. B. Hawley Subdivision of the said J. E. Hawley League in Hardin County, Texas, embraced in said suit No. 8399" (quoting from Plaintiffs' Original Complaint, Paragraph 15). The total value of tracts numbered 70, 71, 72, 98, and 99 is less than $3,000.00.

Plaintiffs C. M. Schriener and wife, Lillian Schreiner (to the exclusion of the other Plaintiffs), allege ownership of "Tract No. 73 of the G. M. B. Hawley Subdivision embraced in Suit No. 8399" (quoting from Paragraph 16 of Plaintiffs' Original Complaint). Said Tract No. 73 is far less than $3,000.00 in value.

Plaintiff Isidore Feuer (to the exclusion of the other Plaintiffs), alleges ownership of "Tract No. 92 of the G. M. B. Hawley Subdivision embraced in Suit No. 399" (quoting from Paragraph 17 of Plaintiffs' Original Complaint). Said Tract No. 92 is far less than $3,000.00 in value.

Plaintiff T. Herbert Johnson (to the exclusion of the other Plaintiffs), "specially alleges that he owns Tract No. 97 of the G. M. B. Hawley Subdivision embraced in Suit No. 8399" (quoting from Plaintiffs' Original Complaint, Paragraph 18). Said Tract No. 97 is far less than $3,000.00 in value.

Plaintiffs Henry J. Schneidt, H. D. Hale, C. S. Osburn and M. A. Bowers (to the exclusion of the other Plaintiffs), "specially allege that they are the owners of Tracts numbered 100 and 101 of the said G. M. B. Hawley Subdivision embraced in Suit No. 8399" (quoting from Plaintiffs' Original Complaint, Paragraph 19). The value in

the aggregate of said tracts numbered 100 and 101 is less than $3,000.00.

Plaintiff Emma J. Miller (to the exclusion of the other Plaintiffs) "alleges that she is owner of Tract No. 102 of the said G. M. B. Hawley Subdivision embraced in Suit No. 8399" (quoting from Plaintiffs' Original Complaint, Paragraph 20). Said Tract No. 102 is far less than $3,000.00 in value.

Plaintiffs O. M. Hazelton and Edward Armstrong (to the exclusion of the other Plaintiffs) "specially allege that they are the owners of Tract No. 110 of the said G. M. B. Hawley Subdivision embraced in Suit No. 8399" (quoting from Paragraph 21 of the Plaintiffs' Original Complaint). Said Tract No. 110 is far less than $3,000.00 in value.

Plaintiff Anna Berger, joined by her husband, Jonas Berger (to the exclusion of the other Plaintiffs), "specially allege that she is the owner of Tract numbered 112 embraced in Suit No. 8399 and Tract numbered 157 embraced in Suit No. 8471" (quoting from Paragraph 22, Plaintiffs' Original Complaint). The value in the aggregate of said Tracts numbered 112 and 157 is less than $3,000.00.

Plaintiff A. D. Davies (to the exclusion of the other Plaintiffs) "specially alleges that he is the owner of Tracts numbered 113, 115 and 116 embraced in Suit No. 8399, and Tracts numbered 137, 138, 154, 155 and 180 embraced in Suit No. 8471" (quoting from Paragraph 23 of Plaintiffs' Original Complaint).

The value in the aggregate of said tracts is less than $3,000.00.

Plaintiff Margaret O'Boyle (to the exclusion of the other Plaintiffs) "specially alleges that she owns Tract No. 114 embraced in Suit No. 8399 and Tract No. 182 embraced in Suit No. 8471" (quoting from Plaintiffs' Original Complaint, Paragraph 24). The value of said Tracts numbered 114 and 182, in the aggregate, is less than $3,000.00.

Plaintiff Sadie E. Gromlich (to the exclusion of the other Plaintiffs) "specially alleges that she owns Tract No. 141 embraced in Suit No. 8471" (quoting from Plaintiffs' Original Complaint, Paragraph 25). The value of said numbered tract is less than $3,000.00.

Plaintiffs W. J. Brong, Ervin Brong, Harvey Brong, Charles Brong, and Elmer Brong (to the exclusion of the other Plaintiffs) "specially allege that they are the owners of Tracts No. 142 and the East 1/2 of 193 of the said G. M. B. Hawley Subdivision" (quoting from Plaintiffs' Original Complaint, Paragraph 26). The aggregate value of Tract No. 142 and the East 1/2 of 193 is less than $3,000.00.

Plaintiffs Lillian E. Von Beck Koch et vir H. W. Koch, Marian E. Von Beck Carter et vir Robert W. Carter, John M. Von Beck (to the exclusion of the other Plaintiffs) allege ownership of Tract No. 143 (see Paragraph 27 of Plaintiffs' Original Complaint). Said Tract No. 143 is far less than $3,000.00 in value.

Plaintiffs Bernice P. Brown, G. Wallace Powell, and Evelyn Greenway (to the exclusion of the other Plaintiffs) "allege that they are the owners of an undivided one-half interest in Tracts numbered 144 and 159 of the G. M. B. Hawley Subdivision embraced in the said Suit

No. 8471" (quoting from Paragraph 28, Plaintiffs' Original Complaint). Said one-half interest in Tracts numbered 144 and 159 is of a value far below $3,000.00.

Plaintiff W. E. Lukens (to the exclusion of the other Plaintiffs) "specially alleges that he is the owner of Tract No. 178 embraced in Suit No. 8471" (quoting from Paragraph 29 of Plaintiffs' Original Complaint). The value of said Tract No. 178 is far less than $3,000.00.

Plaintiff Dr. C. A. Craig (to the exclusion of the other Plaintiffs) "specially alleges that he is the owner of Tract No. 199 of the said G. M. B. Hawley Subdivision" (quoting from Paragraph 30 of Plaintiffs' Original Complaint). The value of said tract is far less than $3,000.00.

Plaintiff John J. Lawler (to the exclusion of the other Plaintiffs) "specially alleges that he is the owner of Tract No. 202" (quoting from Paragraph 31 of the Plaintiffs' Original Complaint). Said Tract No. 202 is far less than $3,000.00 in value.

Plaintiff Mrs. Lula M. Fee Snider, joined by her husband, J. W. Snider (to the exclusion of the other Plaintiffs) "specially alleges that she is the owner of Tract No. 203 of the said G. M. B. Hawley Subdivision, embraced in Suit No. 8471" (quoting from Plaintiffs' Original Complaint, Paragraph 32). Said tract No. 203 is much less than $3,000.00 in value.

As to the present market value of the lands respectively claimed by Plaintiffs, an affidavit as to such market value is attached hereto, marked Exhibit E and made a part hereof.

IV.

To dismiss this action because the court lacks jurisdiction of this action in that Plaintiffs' Complaint fails to disclose any allegation of fact as a basis which would show that this is a case arising under the due process clause of the Fourteenth Amendment of the Constitution of the United States.

There is no allegation that alleges deprivation of property without due process of law caused by the State or by any agency or any court thereof. The fraud alleged is a fraud allegedly perpetrated by individuals, not by action of the State, and, being such, is not within the purview of the Fourteenth Amendment.

V.

To dismiss the action because the Plaintiffs have failed to state a claim upon which relief can be granted for the following reason:

> The Complaint of the Plaintiffs filed herein shows that Plaintiffs seek to set aside and hold for naught two judgments of the District Court of Hardin County, Texas.

Filed herewith and attached hereto as Exhibit A is a certified copy of judgment of the District Court of Hardin County, Texas, in Cause No. 8399, styled John R. Bevil vs. A. L. Chivers, et al., recorded in the Minutes of said Court, Volume 9, Page 8 et seq., and dated August 29, 1945.

Filed herewith and attached hereto as Exhibit B is a certified copy of judgment of the District Court of

Hardin County, Texas, in Cause No. 8471, styled John R. Bevil vs. W. S. Johnson, et al., recorded in the Minutes of said Court, Volume 9, Page 24, et seq., and dated January 7, 1946.

Said judgments are over ten years old. It thus appears that a direct attack upon these judgments is barred by the four year statute of limitations of the State of Texas, to-wit: Article 5529, Revised Civil Statutes of Texas, applicable to such actions.

WHEREFORE, these Defendants respectfully pray the court that this action against them by the Plaintiffs be dismissed.

/s/ B. F. WHITWORTH by J.F.P.
B. F. Whitworth
P. O. Box 517
Jasper, Texas

/s/ JAMES F. PARKER
James F. Parker
1103 American National Bank Bldg.
Beaumont, Texas
Attorneys for All Defendants

CERTIFICATE OF SERVICE

It is here certified that a copy of this Defendants' First Amended Motion to Dismiss has been delivered to R. F. Roberts, attorney for Plaintiffs at his office at 420 Goodhue Building in Beaumont, Texas.

B. F. WHITWORTH and
JAMES F. PARKER

/s/ JAMES F. PARKER.
By James F. Parker

EXHIBIT "C-12"

A. D. Davies, et ux
-to-
R. F. Roberts

Quitclaim Deed
Dated August 2, 1951
Filed August 8, 1952
Recorded in Vol. 254, P 518
Deed Records Hardin County, Texas

#2669

THIS DEED Made the Second day of August in the year of our Lord One Thousand Nine Hundred and Fifty-One, between A. D. Davies, of the Borough of Honedale, County of Wayne and Commonwealth of Pennsylvania, and Mame C. Davies, his wife, of the same Borough, County and Commonwealth, Grantors and R. F. Roberts, of Beaumont, Jefferson County, Texas, Grantee, WITNESSETH, that in consideration of one dollar and other good and valuable consideration in hand paid the receipt whereof is hereby acknowledged; the Grantors do hereby release and quit claim to the said Grantee, his heirs and Assigns.

All those certain tracts or parcels of land in the Joel Edwin Hawley League in Hardin County, Texas, Abstract Number 26, and being a portion of the G. M. B. Hawley subdivision of said league, a plat of said subdivision being recorded in Volume 22 page 92 of the Deed Records of Hardin County, Texas said tracts conveyed being described as follows:

Tracts Numbered:

One Hundred Thirteen (113)
One Hundred Fifteen (115)
One Hundred Sixteen (116)
One Hundred Thirty Seven (137)
One Hundred Thirty Eight (138)
One Hundred Fifty Four (154)
One Hundred Fifty Five (155) and

An undivided one-third (1/3) interest in Tracts numbered:

Three Hundred Fifty Five (355)
Three Hundred Fifty Six (356)
Three Hundred Fifty Seven (357)

Grantors hereby reserve for themselves, their heirs and assigns, an undivided 1/8th of all minerals; Grantors hereby reserve for themselves, their heirs and assigns, one-half of their minerals, being an undivided 7/16ths of said minerals conveying to grantee, with the surface, an undivided 7/16ths of said minerals.

In Witness Whereof, the Grantors have hereunto set their hands and seals the day and year first above written.

A. D. *Davis*
Mame C. *Davis*

Commonwealth of Pennsylvania
County of Wayne: SS.

On this the 2nd day of August, A. D. 1951, before me the undersigned Officer, personally appeared A. D.

Davies and Mame C. Davies, his wife, known to me (or satisfactorily proven) to be the person whose names are subscribed to the within instrument, and acknowledged that they executed the same for the purposes therein contained.

In Witness Whereof, I hereunto set my hand and official Seal.

Edward H. Swoyer, Notary Public

My Commission expires
Jan. 29, 1955

(Seal)

State of Pennsylvania,
County of Wayne, SS.

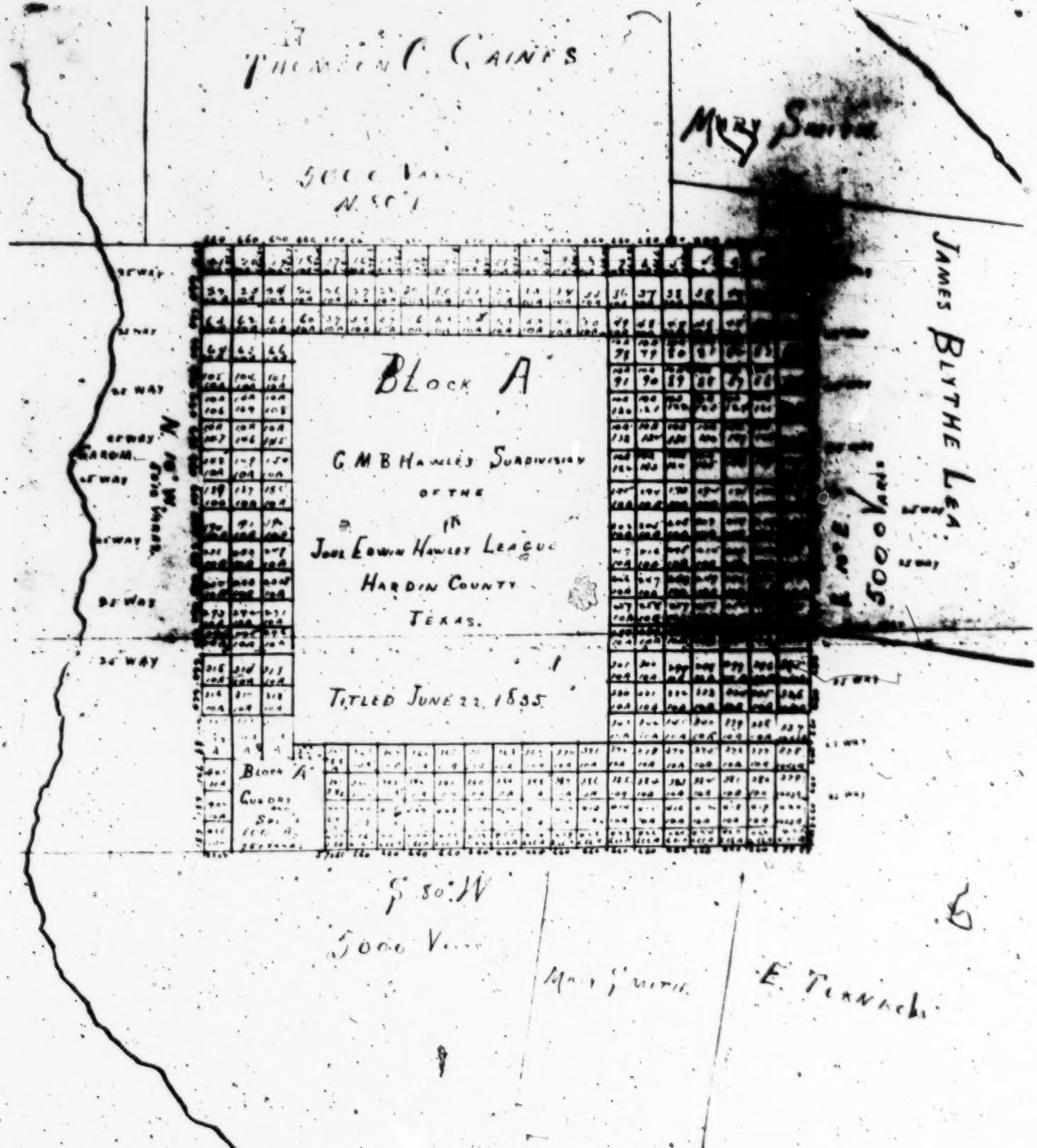
I, Helen M. Oakes, Prothonotary of the Court of Common Pleas of said County, the same being a Court of Record, held therein do hereby certify, that Edward H. Swoyer whose name is subscribed to the Certificate of probate or acknowledgment of the annexed instrument and thereon written, was, at the time of taking such probate and acknowledgment, a Notary Public in and for said State and County, duly commissioned and sworn and authorized by the laws of said State to take the same, and to take the acknowledgment of deeds, conveyances, and other instrument of writing relating to lands, tenements, or hereditaments in the State of Pennsylvania, and to administer oaths and affirmations and certify the same.

And further that I am well acquainted with the handwriting of said Notary Public, and verily believe that the signature to said certificate of acknowledgment is genuine.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court, the 2nd day of August 1951.

Helen M. Oakes, Prothonotary

(Seal)


Thomas C. Caines
Mary Smith
James Blythe Lea
Block A
G M B Hawley's Subdivision
of the
Joel Edwin Hawley League
Hardin County
Texas.
Titled June 22, 1835
Block A
Cul de
Sac
S 80° W
5000 Vara
Mary Smith
E. Tennach

THE STATE OF TEXAS
COUNTY OF HARDIN

I, CLARENCE McNEELY, CLERK of the County Court in and for Hardin County, Texas, do hereby certify that the above and foregoing is a true and correct copy of a certain Plat from Geo. M. B. Hawley to Jorl Edwin Hawley Lg., as the same appears of record in Volume 22, Page 92, of the Deed Records in and for Hardin County, Texas.

GIVEN under my hand and seal of office, this the 2nd day of August, 1956.

CLARENCE McNEELY
COUNTY CLERK

(Seal)

HARDIN COUNTY, TEXAS

By Mary Francis David, DEPUTY

## EXHIBIT "D"

THE STATE OF TEXAS §
COUNTY OF JEFFERSON §

Before me, the undersigned authority, on this day personally appeared James F. Parker, known to me to be a credible person, who first having been by me duly sworn, upon oath states:

That within the knowledge of affiant the following named persons are each and all residents and citizens of the State of Texas and have been such citizens of the State of Texas at all times since January 1, 1956, namely: R. F. Roberts, John R. Bevil, Jr., A. L. Bevil, Maud Bevil Black, Etoile Bevil, Constance B. McElroy, Dr. F. B. Hart, Mary Louise McKee and husband, Clyde V. McKee, and Vada K. Bevil.

/s/ JAMES F. PARKER
James F. Parker

Subscribed and sworn to before me, the undersigned authority, by James F. Parker on this 12th day of September A. D. 1956.

/s/ PATRICIA EAVES
Notary Public in and for
Jefferson County, Texas

(Seal)

Patricia Eaves, Notary Public
in and for Jefferson County, Texas

THE STATE OF TEXAS §
COUNTY OF JEFFERSON §

Before me, the undersigned, a Notary Public in and for said County and State, on this day personally appeared

James F. Parker, known to me to be the person whose name is subscribed to the foregoing instrument, and acknowledged to me that he executed the same for the purposes and consideration therein expressed.

Given under my hand and seal of office this 12th day of September, A. D. 1956.

/s/ PATRICIA EAVES
Notary Public in and for
Jefferson County; Texas

(Seal)

Patricia Eaves, Notary Public
in and for Jefferson County, Texas

EXHIBIT "E"

THE STATE OF TEXAS §
COUNTY OF JEFFERSON §

Before me, the undersigned authority, on this day personally appeared L. L. Williams, known to me to be a credible person, who first having been by me duly sworn, upon oath states:

That since the year 1938 affiant has dealt extensively in lands in Hardin County, Texas, both buying and selling lands. Prior to 1945 for some eight years affiant operated a sawmill in Kountze, in Hardin County, Texas, and is now the owner of several thousand acres of land in various parts of Hardin County, Texas; that affiant is familiar with the market value of lands in Hardin County, Texas, and is familiar with the lands in the Joel E. Hawley League in Hardin County, Texas, and that such lands in said Hawley League in the opinion of

affiant have a market value of Thirty and No/100 ($30.00) Dollars per acre, at this time.

/s/ L. L. WILLIAMS
L. L. Williams

Subscribed and sworn to before me, the undersigned authority, by L. L. Williams on this 12th day of September, A. D. 1956.

/s/ PATRICIA EAVES
Notary Public in and for
Jefferson County, Texas

(Seal)

Patricia Eaves, Notary Public
in and for Jefferson County, Texas

THE STATE OF TEXAS §
COUNTY OF JEFFERSON §

Before me, the undersigned, a Notary Public in and for said County and State, on this day personally appeared L. L. Williams, known to me to be the person whose name is subscribed to the foregonig instrument, and acknowledged to me that he executed the same for the purposes and consideration therein expressed.

Given under my hand and seal of office this 12th day of September, A. D. 1956.

/s/ PATRICIA EAVES
Notary Public in and for
Jefferson County, Texas

(Seal)

Patricia Eaves, Notary Public
in and for Jefferson County, Texas

## APPENDIX C

## DISTRICT COURT'S FINDINGS OF FACT AND CONCLUSIONS OF LAW

**In The**
**UNITED STATES DISTRICT COURT**
**For The Eastern District of Texas**
**Beaumont Division**

| | | |
|---|---|---|
| MARGARET O'BOYLE, ET AL | § | |
| vs | § | CIVIL ACTION |
| JOHN R. BEVIL, JR., ET AL | § | FILE NO. 3296 |

The Court makes and files the following as its Findings of Fact and Conclusions of Law in the above entitled and numbered Cause:

### I. FINDINGS OF FACT

PLAINTIFFS Margaret O'Boyle, Joseph A. Bodie, Jr., Ann Bodie Ward, joined by her husband, Sherman Ward, Barbara Ferber, a feme sole, Grace Hanlon, a feme sole, Sarah Mole, joined by her husband, Herbert Mole, Walter Synar, C. M. Schreiner and wife, Lillian Schernier, Emma J. Miller, O. M. Hazelton, Edward Armstrong, Anna Berger, joined by her husband, Jonas Berger, A. D. Davies, Sadie E. Bromlich, W. J. Brong, Ervin Brong, Harvey Brong, Charles Brong, and Elmer Brong, John M. Von Beck, Lillian Von Beck Koch, et vir, H. W. Koch, John J. Lawler, T. Herbert Johnson, H. J. Schneidt, H. D. Hale, C. S. Osburn, M. A. Bowers, Isidore Feuer, W. E. Lukens, Dr. C. A. Craig, Mrs. Lula M. Fee Snider, joined by her husband, J. W. Snider, Alexander Luckanick, Christine Luckanick, a feme sole, John Luckanick, Anna Luckanick Sviatyla, joined by her husband, Metry Sviatyla, Evelyn Luckanick Seaman, et vir, Walter Seaman, Julie Luckanick

Rogalenick et vir, Mike Rogalenick, Jennie Luckanick Bennett et vir, Harold A. Bennett, Mary Luckanick Simmons et vir, Henry Simmons, Marian E. Von Beck Carter et vir, Robert W. Carter, Bernice P. Brown, G. Wallace Powell and Evelyn Greenway, failed to prove that they or those under whom they claim ever acquired or owned any right, title or interest in and to the lands described in and recovered by John R. Bevil in the following final judgments rendered in the District Court of Hardin County, Texas, identified below as follows:

(A) The Judgment rendered and entered on August 29th, 1945, in cause No. 8399 styled John R. Bevil vs. A. L. Chivers, et al, in the District Court of Hardin County, Texas, recorded in the minutes of the District Court of Hardin County, Texas, Volume 9, page 8, and also recorded in the Deed Records of Hardin County, Texas, Volume 313, page 485.

(B) The Judgment rendered and entered on January 7th, 1946, in cause No. 8471 styled John R. Bevil vs. W. S. Johnson et al, in the District Court of Hardin County, Texas, recorded in the minutes of the District Court of Hardin County, Texas, Volume 9, page 24, et seq, and also recorded in the Deed Records of Hardin County, Texas, Volume 313, page 477, et seq,

2. Plaintiffs specially pleaded their title alleging that they held and claimed title through and under deeds from Texas Little Farms Co. purporting to convey certain numbered tracts out of the G. M. B. Hawley Subdivision of the Joel E. Hawley League as per plat dated July 27, 1903, recorded in Volume 22, page 92, of the Deed Records of Hardin County, Texas, such deeds being set out in paragraphs 15 to 34, both inclusive, of Plaintiffs' First Amended Original Complaint. There are no such numbered tracts on the plat

referred to in such deeds and, therefore, such deeds convey no land. Such deeds furnish no data or other means by which any land whatsoever can be located on the ground and are, therefore, void.

3. Prior to and at the time of the institution of the above suits in the District Court of Hardin County, Texas, John R. Bevil was the owner of the lands recovered by him against the defendants in such suits.

4. The Judgments in the State Courts hereinabove identified were not fraudulently obtained.

5. The State Court judgments attacked by plaintiffs were rendered by the District Court of Hardin County, Texas, and each of said judgments was rendered and entered more than four years before the filing of Plaintiffs' Original Complaint in this Cause. Each of such judgments recites that the defendants in such cause "had been duly and legally cited by publication to appear and answer" in such suit and each contains a finding by the Court "that the defendants, and each of them, have been duly cited in terms of law and as required by law to appear and answer" in such suit. Each of such judgments further recites that the defendants in such suit were represented on the trial thereof by an attorney who had been appointed by the Court to represent said defendants. Each of such judgments adjudicated title to land situated in Hardin County, Texas.

6. The State Court judgments attacked by plaintiffs were rendered and entered by the District Court of Hardin County, Texas, which was a court of competent jurisdiction of the subject matter involved in each suit and also having jurisdiction of the parties to each such suit. Each of such judgments adjudicated the title to land

situated in Hardin County, Texas, and under the terms of each of such judgments John R. Bevil recovered of and from the respective Defendants in each suit the title to and possession of lands sued for by him as against the defendants in each such suit.

Each of such State Court judgments upon its face is a valid and subsisting final judgment as of the date of rendition and entry of each such judgment.

7. Prior to the filing of the instant suit and after the rendition and entry of the final judgment on August 29th, 1945, in the District Court of Hardin County, Texas, in Cause No. 8399 styled John R. Bevil vs. A. L. Chivers, et al., more than four years elapsed after plaintiffs in the instant suit and those under whom they claim knew, or should have known, of the rendition and entry of such judgment.

8. Prior to the filing of the instant suit and after the rendition and entry of the final judgment on January 7, 1946, in the District Court of Hardin County, Texas, in Cause No. 8471 styled John R. Bevil vs. W. S. Johnson, et al., more than four years elapsed after plaintiffs in the instant suit and those under whom they claim knew, or should have known, of the rendition and entry of such judgment.

9. The defendants other than W. L. Selman and the United States of America have acquired and now own the title to the lands adjudicated in the State Court judgments to have been vested in John R. Bevil.

10. There is a diversity of citizenship of the parties and the value of the property involved herein is in excess of Three Thousand Dollars.

## CONCLUSION OF LAW

1. Since the plaintiffs have no right, title or interest in the lands involved in the State Court judgments, plaintiffs have no cause of action of any kind against the defendants as to the lands involved in the State Court judgments.

2. The State Court judgments are not subject to direct attack in this court.

3. Based upon the finding that the two State Court judgments were not fraudulently obtained, and other findings hereinabove set out, the Court concludes that plaintiffs have not been deprived of the due process of law provision of the Federal Constitution as embodied in the Fourteenth Amendment to the Constitution.

4. This suit constitutes a collateral attack on the two State Court final judgments since each of such judgments is valid on its face such judgments import absolute verity and cannot be set aside or vacated in this proceeding.

5. The four year statute of limitation of the State of Texas, to-wit: Article 5529 of the Revised Civil Statutes of the State of Texas pleaded by the defendants is a bar to every cause of action asserted by plaintiffs herein.

6. Defendants having pleaded the State Court judgments as res adjudicata against plaintiffs' assertion of title to the lands involved in said State Court judgments, such final judgments are a bar to plaintiffs asserting in this proceeding that they have any right, title or interest in such lands.

7. Based upon the above and foregoing Findings of Fact and Conclusions of Law, plaintiffs are not entitled to recovery of any relief prayed for by them and all such relief should be denied.

Where the word "defendants" is used in the above and foregoing Conclusions of Law such word does not include either W. L. Selman, Clerk of the District Court of Hardin County, Texas, or, the United States of America, both such parties being named as defendants in plaintiffs' First Amended Original Complaint, but includes and refers to the other named defendants, who are referred to in the pleadings as the Bevil heirs and Bevil defendants.

Counsel for defendants have been, and are here now, directed to prepare and present an appropriate form of judgment and decree for signing and entry.

Done this 16th day of December, 1957.

(Signed) LAMAR CECIL
United States District
Judge

(Note: In the Findings of Fact and Conclusions of Law appearing in the Record the Word "judgment" is at times spelled "judgements". We have corrected such spelling.)

## DISTRICT COURT'S FINAL JUDGMENT AND DECREE

In The
**UNITED STATES DISTRICT COURT**
For The Eastern District of Texas
Beaumont Division

| | | |
|---|---|---|
| MARGARET O'BOYLE, ET AL | § | |
| vs | § | CIVIL ACTION |
| JOHN R. BEVIL, JR., ET AL | § | FILE NO. 3296 |

On the *17th* day of *October*, A. D. 1957, came on to be heard in its regular order at regular term of this court the above entitled and numbered cause, and thereupon came:

(a) the plaintiffs Margaret O'Boyle, Joseph A. Bodie, Jr., Ann Bodie Ward, joined by her husband, Sherman Ward, Barbara Ferber, a feme sole, Grace Hanlon, a feme sole, Sarah Mole, joined by her husband, Herbert Mole, Walter Synar, C. M. Schreiner and wife, Lillian Schreiner, Emma J. Miller, O. M. Hezelton, Edward Armstrong, Anna Berger, joined by her husband, Jonas Berger, A. D. Davies, Sadie E. Gromlich, W. J. Brong, Ervin Brong, Harvey Brong, Charles Brong and Elmer Brong, John M. Von Beck, Lillian Von Beck Koch, et vir, H. W. Koch, John J. Lawler, T. Herbert Johnson, H. J. Schneidt, H. D. Hale, C. S. Osburn, M. A. Bowers, Isidore Feuer, W. E. Lukens, Dr. C. A. Craig, Mrs. Lula M. Fee Snider, joined by her husband, J. W. Snider, Alexander Luckanick, Christine Luckanick, a feme sole, John Luckanick, Anna Luckanick Sviatyla, joined by her husband, Metry Sviatyla, Evelyn Luckanick Seaman, et vir, Walter Seaman, Julie Luckanick Rogalenick et vir, Mike Rogalenick, Jennie Luckanick Bennett et vir, Harold A. Bennett, Mary Luckanick Simmons et vir, Henry Simmons, Marian E. Von Beck Carter et vir, Robert W. Carter, Bernice P. Brown, G. Wallace Powell and Evelyn Greenway by their attorneys of record, the Honorable R. F. Roberts and the Honorable Hugh Freeland,

(b) the defendant, W. L. Selman, clerk of the District Court of Hardin County, Texas, by his attorney of record, James F. Parker, and

(c) the defendants, John R. Bevil, Jr., A. L. Bevil, Maud Bevil Black, a feme sole, Etoile Bevil, a feme sole, Constance B. McElroy, a feme sole, Dr. F. B. Hart, Mary Louise McKee, et vir, Clyde v. McKee and Vada K. Bevil, a feme sole, by their attorneys of record, B. F. Whitworth and James F. Parker.

The United States of America heretofore having been dismissed from this cause by order of this court received and filed by the clerk on the third (3rd) day of June, A. D. 1957, such order of dismissal is hereby reaffirmed. Thereupon all parties announced ready for trial, waived a jury and submitted all matters of fact as well as of law to the court for determination. The court having heard the pleadings of the parties, the evidence, and argument of counsel and fully considered same is of the opinion, as set forth in the court's Findings of Fact and Conclusions of Law, that plaintiffs are not entitled to any of the relief sought herein by them, and have wholly failed to sustain any cause of action asserted by them herein.

It is accordingly DECLARED, ADJUDGED AND DECREED that the two judgments of the District Court of Hardin County, Texas, namely:

(A) The Judgment rendered and entered on August 29th, 1945, in cause No. 8399 styled John R. Bevil vs. A. L. Chivers, et al., in the District Court of Hardin County, Texas, recorded in the minutes of the District Court of Hardin County, Texas, Volume 9, page 8, and also recorded in the Deed Records of Hardin County, Texas, Vol. 313, page 485.

(B) The Judgment rendered and entered on January 7th, 1946, in cause No. 8471 styled John R. Bevil vs. W. S. Johnson, et al., in the District Court of Hardin County, Texas, recorded in the minutes of the District Court of Hardin County, Texas, Volume 9, page 24, et seq., and also recorded in the Deed Records of Hardin County, Texas, Volume 313, page 477, et seq., are valid and subsisting final judgments.

It is further ORDERED, ADJUDGED AND DECREED that plaintiffs be and are hereby denied all relief sought herein by them against the defendants with reference to the above identified judgments of the District Court of Hardin County, Texas and the lands adjudicated in each judgment to be owned by John R. Bevil as against the respective defendants in each State Court judgment.

It is further ORDERED, ADJUDGED and DECREED that all issues herein relating to liens owned by the United States of America on the estates of John R. Bevil, deceased, and Martha A. Bevil, deceased, be, and same are hereby dismissed and also the Untied States of America is dismissed herefrom with no costs adjudged against it.

It is further ORDERED that all costs herein be taxed against plaintiffs, for which the officers of this Court may have their execution.

Rendered on the *14th* day of November, A. D. 1957 and entered this *16th* day of December, A. D. 1957.

(Signed) Lamar Cecil
United States District Judge

## APPENDIX D

## OPINION OF THE COURT OF APPEALS

IN THE

# United States Court of Appeals

FOR THE FIFTH CIRCUIT

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No. 17158

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MARGARET O'BOYLE, ET AL., *Appellants*

VERSUS

JOHN R. BEVIL, JR., ET AL., *Appellees*

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(September 26, 1958)

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**Appeals from the United States District Court for the Eastern District of Texas**

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Before HUTCHESON, Chief Judge, and TUTTLE and CAMERON, Circuit Judges.

TUTTLE, Circuit Judge: This suit was filed in the district court as a proceeding in equity to remove as an alleged cloud upon plaintiff's titles two Texas state court judgments, and to enjoin their enforcement by defendants. The state court judgments were obtained by John R. Bevil, Sr., the ancestor and predecessor in interest of the defendants in this case, against the plain-

tiffs in the instant case. Involved in this suit are the issues of whether plaintiffs alleged a title or interest in the land in question in the state court suits sufficient to enable them to challenge those judgments and whether the judgments can be successfully attacked in this proceeding.

The case was tried after motion to dismiss, converted into motion for summary judgment, was denied. The court entered judgment for the defendants, concluding that the plaintiffs had no right, title or interest in the lands involved in the state court judgments and further that such judgments were not fraudulently obtained; plaintiffs had not been deprived of due process of law; the judgments appearing valid on their face import absolute verity and could not be set aside; and the four year Texas statute of limitations[1] was a bar to every cause of action asserted by plaintiffs. From this judgment plaintiffs have appealed.

Before discussing the propriety of the district court's orders and judgment it will be necessary to review the allegations, facts and posture of the parties in some detail.

Prior to 1919 John R. Bevil, Sr., the ancestor of the present defendants, and W. D. Myers owned in common the lands known as the Joel E. Hawley League, situated in Hardin County, Texas. By a partition deed of September 11, 1919, in evidence in this case, Bevil and Myers divided the League with Bevil obtaining title to the north 2325.5 varas, measured out to some 2049 acres.

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1 Art. 5529, Revised Civil Statutes.

On September 22, 1924, John R. Bevil, Sr. executed a deed to Texas Little Farms Co., an Ohio corporation, stating a cash consideration of $10,000. The deed described the land conveyed as follows:

> "Being Seven Hundred and ten (710) acres of land out of the north half of the Joel E. Hawley League hereinafter described by Lot Number according to the map of a subdivision of the said Joe E. Hawley League, of record in Vol. 22, page 92 of the Deed Records of Hardin County, Texas, to which reference is hereby made."[2]

Then followed a naming by number of the specific lots conveyed. The specific map referred to in the deed and recorded in the Deed Records of Hardin County, Texas, does not show a lot bearing each number contained in the deeds. The subdivision is divided into lots with number one in the northeast corner, number two adjacent to number one to the west and the numbers continuing in order to number 21 which is in the northwest corner of the plot. Number 22 is directly south of number 21 and the rest of the numbered lots continue east and west alternately through the plot. In approximately the center of the plot there is a large area of land shown on the map which is not subdivided into lots and not numbered. But the numbering sequence on the recorded map is interrupted in such a way that this plot could be divided into equal sized lots and numbered perfectly to fit in which the other

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[2] Two other deeds from Bevil to Texas Little Farms Co. are also in evidence, reciting as consideration vendor's lien notes for $8,965.00 and $9,035.00, respectively, with the property described in the same manner as the above deed. These three deeds together conveyed acreage totaling substantially all the tract owned by Bevil.

numbered lots if the same pattern and sequence of numbering is followed. For example, in the fourth row of lots from the north the blank space is bounded by lot 66 on the west and 78 on the east, allowing the 11 missing numbers to be placed in the unnumbered area with each lot of a size equal to the remaining lots. This method of supplying the missing numbers can be accomplished in each row of the plot, with the result that the total area would then consist of numbered lots in the proper sequence. A picture of this recorded plat is annexed in order to make clearer our description of it.

During 1924—1925 John R. Bevil, Sr. executed releases to Texas Little Farms Co. for recited considerations totaling $18,000. Thus, by the deeds and releases in evidence Bevil purportedly conveyed for $28,000 practically the entire 2325.5 north varas of the Hawley League which he had acquired, to Texas Little Farms Co.

Plaintiffs allegedly derive their title from deeds to them individually from Texas Little Farms Co. An example of the total descriptive part of the grant is as follows:

> ". . . the following REAL ESTATE situated in the County of Hardin in the State of Texas and in the . . . of . . . and bounded and described as follows:
>
> "Being tract Number Sixty-seven (67) of the G.M.B. Hawley Subdivision of the Joel E. Hawley League, as recorded in Vol. 22, page 92 of the Deed Records of Hardin County, Texas."

As mentioned above, the plat on the specific page of the Deed Records of Hardin County does not show lots with numbers corresponding to those in plaintiffs'

deeds. For instance, as to the above described lot there is no lot "Number Sixty-seven (67)," although there is a lot 66 and an unnumbered area immediately adjacent to it.

John R. Bevil, Sr., in 1945, instituted two suits to quiet title in the District Court of Hardin County, Texas, naming as defendants most of the plaintiffs in the instant suit and praying for an adjudication of title in plaintiff. The land in issue was the tract shown on the plat as not containing numbered lots. Since the defendants were all nonresidents, process was obtained by publication under Art. 2039, Texas Rules of Civil Procedure, Rule 109 as it then read.[3] None of the defendants appeared, and proceedings were held and judgments rendered against them.[4]

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3 Rule 109: "Where a party to a suit, his agent or attorney, shall make oath **when the suit is instituted** or **any time during its progress**, that any party defendant therein is a nonresident of the State, or that he is absent from the State, or that he is a transient person, or that his residence is unknown to affiant, the clerk shall issue a citation for such defendant for services by publication." (Emphasis added).

4 Texas law provided for this situation as follows:
Rule 800, Texas Rules of Civil Procedure:

"Proof Ex Parte

If the defendant has been cited only by publication, and fails to appear and answer by himself, or by attorney of his own selection, or if any defendant, having answered, fails to appear by himself or attorney when the case is called for trial on its merits, the plaintiff shall make such proof as will entitle him prima facie to recover, whereupon the proper judgment shall be entered."

Rule 812:

"No Judgment by Default.

No judgment by default shall be taken in such case, but the facts entitling the plaintiff to judgment shall be exhibited to the court on the trial; and a statement of facts shall be filed as provided by law and these rules in suits against nonresidents of this State where no appearance has been made by them."

The transcript of the state suit No. 8399, in evidence in the case at bar, shows that the petition was filed June 27, 1945, but the affidavit for citation by publication was sworn to June 25, 1945. The transcript of suit No. 8471 reveals that the affidavit for citation by publication was sworn to one day before it was filed. The appearance day specified in the citation was January 14, 1946, yet counsel was appointed to represent the nonresident defendants on January 7, 1946, and judgment was rendered and entered against them the same day, seven days before appearance day. In neither suit did Bevil introduce into evidence the purported deeds from him to Texas Little Farms Co. or the deeds from Texas Little Farms Co. to the nonresident defendants. These were the very conveyances which created the cloud on Bevil's title and which it was the purpose of the suits to clear up.

The record in this case makes perfectly plain, therefore, that Bevil sold land in 1923 for some $28,000 by descriptions taken from a plat recorded in the land records of Hardin County; that in 1945 he sought to set aside the same conveyances as to some one-third of the total on the basis that the descriptions he had used were inadequate to identify the land; he made this move against nonresident defendants who were served by publication only and in proceedings as to which there were procedural defects leading up to the state court judgments; and in presenting his case to the court he did not either plead or introduce in evidence the very deeds which created the alleged clouds on his title which the suits were brought to remove; on such a deficient showing of the true facts the court entered these judgments; the judgments were obtained, of course, without any actual notice to the defendants.

This suit is brought to nullify the effect of these state court judgments. The judgments are attacked on the basis of the procedural defects leading up to the judgments under the Texas law authorizing service upon nonresidents by publication and on the grounds of fraud. The fraud asserted is that the defendants, in presenting their case to the state court, withheld knowledge of the conveyances from Bevil to Texas Little Farms Co. and to the plaintiff here.

A suit presenting such a state of facts must appeal strongly to the sense of justice of any tribunal. Was the judgment dismissing the suit caused by error which calls for its reversal here? We conclude that it was. Reliance, in sustaining the trial court's dismissal of the suit, is first placed by the defendants on the proposition that the plaintffs have no standing to attack the state court judgments, however vulnerable they may be, because they failed to allege and prove an interest in the land litigated over in these suits. Such was the conclusion of the trial court. We deal first with this question, for undoubtedly a party must show that he has a justiciable interest in the subject matter in order to maintain litigation thereabout. *Hollar v. Jowers*, 310 S.W. 2d 721; *City of Waco v. Akard*, 252 S.W. 2d 496; *Yett v. Cook*, 281 S.W. 837; 39 Am. Jur. 860, Sect. 10.

The question then is: did the appellants allege and prove in the trial court an interest in the subject matter of the state court suits sufficient to give them the standing to bring this action to set aside the state court judgments?

Appellees contend, and the trial court agreed, that the deeds under which appellants claim title to their

respective lots were void for lack of adequate description of any land described in the state court suits. We think the trial court did not and neither do we reach this issue. The appellants need not show here any more than they had a justiciable interest in the subject matter of the litigation; that is that they had a colorable claim to the land that was then before the court. We do not need to decide that appellants have good title to these tracts and we do not do so. We decide only that their allegations and proof entitle them to ask a court to look into their claim that the judgments were void. Appellants have alleged and proved that they hold deeds describing lots purporting to lie within the tract which appellees described in their two state court suits. If these deeds had been introduced in evidence in the state court suits the court could then have decided whether they were sufficient on their face to identify tracts on the ground covered by the Bevil claims, but they were not introduced in evidence, and, of course, no opportunity was afforded appellants to undertake to offer proof to resolve any ambiguities, if any there were, because they were not aware of the suits at all. We find, on careful examination of the record, that at least as between Bevil and those holding under him appellants' claims of title to parcels of land within that set out in the state court suits was more than a colorable one; that a court having all the deeds, releases, records, surveys and testimony as to common understanding of the numbering of the lots in the Hawley subdivision might well have construed the deed to each of the appellants as conveying specific lots within the unnumbered area marked "Lot A." That is all we need decide in order to hold that appellants alleged and proved a justiciable interest in the subject matter of the state lawsuits.

We next come to the merits of the attack on the two judgments. Questions as to the setting aside of judgments are difficult at best. This difficulty is increased when attack is made in a federal court on a state court judgment. There is one principle, however, that stands out clearly in this area of controversy. That is that in diversity cases, a federal court may set aside a state court judgment for equitable grounds that are recognized by the state as a basis for such action.[5] When, as is true in Texas, a judgment can be set aside for want of jurisdiction or for fraud, the federal court, exercising its equity jurisdiction, can act similarly in a diversity case.

It is not disputed that the record in both the state court cases discloses procedural errors. In No. 8399 the petition was filed June 27, 1945. In order to obtain an order for service by publication the plaintiff must "make oath *when the suit is instituted or any time during its progress,*" that the defendant *is* a nonresident. Here such affidavit was made two days before the suit was filed. Obviously this is not a compliance with the statute, which is designed to require an oath that during the pendency of the action the defendant is a nonresident. An affidavit to that effect at any time before the filing of the suit clearly throws no light on the fact of residence *when the suit is instituted* or thereafter.

In No. 8471 the affidavit was made one day before the suit was filed, but there was also in that case a much more glaring defect. The court's order for publication made the appearance day January 14, 1946; this appearance day was, of course, published in the newspaper notice to the defendants. Yet the record discloses that on

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[5] Cf. Connell v. Dulien Steel Products Co., 5 Cir., 252 F. 2d 556, in which relief was denied because under the Louisiana Code, the Louisiana courts could not grant the relief sought.

January 7, 1946, seven days before the return day, the case was disposed of by the entry of judgment against the defendants.

Under Texas law it is clear that a judgment entered before the return day is void. *Davenport v. Rutledge*, 187 SW 988; *Sneed v. Box*, 166 SW 2d 951. This would appear to resolve the question as to the second judgment. Moreover, as to the failure of the plaintiffs to make oath at the time prescribed in the statute, the Davenport case says:

> "The statutes relating to citation by publication are not liberally interpreted, but strictly construed, and a strict compliance with the essential requirements of the statute is required."

We think that this is but the expression of the same principle announced in the old case of *Galpin v. Page*, 85 U.S. 350.[6]

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[6] Since the sufficiency of notice by publication on a nonresident must, in the end, be measured by the requirements of due process, this language from Galpin v. Page is significant:

> ". . . . The statute provides, in case of absent and nonresident defendants, for constructive service of process by publication. It requires an order of the court or judge before such publication can be made; it designates the facts which must exist to authorize the order, the manner in which such facts must be made to appear, the period for which publication must be established. These provisions, as already stated, must be strictly pursued, for the statute is in derogation of the common law. And the order, which is the sole authority for the publication, and which by statute must prescribe the period and designate the paper in which the publication is to be made, should appear in the record with proof of compliance with its directions, unless its absence is supplied by proper averment. If there is any different course of decision in the State it could hardly be expected that it would be followed by a Federal court, so as to cut off the right of a citizen of another State from showing that the provisions of law, by which judgment has been obtained against him, have never been pursued."

We do not, of course, question the constitutionality of a state statute for service by publication for nonresidents in an in rem proceeding. However, unless such statutes meet the minimum standards of due process, they cannot stand. See *Mullane v. Central Hanover Trust Co.*, 339 U.S. 306. We do note, as said in the opinion in that case, "It would be idle to pretend that publication alone, as prescribed here, is a reliable means of acquainting interested parties of the fact that their rights are before the courts." This fact has inevitably led the courts to exact strict compliance with provisions of statutes for service on nonresidents by publication. *Galpin v. Page, supra; Butler v. McKay*, 9 Cir., 138 F. 2d 373, cert. denied, 321 U.S. 780; *Harlan v. Sparks*, 10 Cir., 125 F. 2d 502. This accords with the Texas view. See *Davenport v. Rutledge, supra; Harris v. Hill*, 117 SW 907. *Durst, et al. v. Park*, 177 SW 2d 301, does not hold contrary to this view, since there was a stipulation in that case as to the truth on the date suit was filed of the fact sworn to one day before.

We conclude, therefore, that the failure of the plaintiffs to follow the statute, which required the making of the oath as to nonresidents *during the pendency of the suits* vitiated the entire proceedings, since there could be no legal citation and publication absent a legal affidavit.

But, says the defendants, the recitals of the state court judgment that the defendants were "duly and legally cited by publication" import absolute verity and may not be shown, even by the record, to be wrong. Appellants rely strongly on *Williams v. Hays*, 13 SW. 1029, and *Bemis v. Bayou Development Company*, 184 SW 2d 645, a Texas Civil Appeals case. These cases state in the broadest terms that recitals of a judgment that service has been legally perfected may not be impeached by other parts

of the record belying that fact. A study of the many Texas cases shows that this rule is not uniformly applied. In *Fowler v. Simpson*, 15 SW 682, the Supreme Court of Texas noted this exception to the rule: where the finding of the judgment pointed specifically to the basic fact, i.e., the citation itself, to support the finding, that fact is available on an attack on the judgment to disprove the finding. This exception was broadened in *Lutcher v. Allen*, 95 SW 572. It is not clear exactly what the law of Texas is where there is a finding of due and legal citation by publication, and an effort is made to prove, not that there was any defect in either the form or fact of the citation or the publication (which was the source of complaint in many of the Texas cases), but that there was an anterior defect, i.e., the absence of a valid affidavit. Whatever would be the view of the Texas courts, we think that constitutional requirements of due process require a holding by any court, state or federal, that no such principles of lifting oneself by his own bootstraps can prevent it, in case of a nonresident defendant, from inquiring into any facts disclosed by the record. But for the rule of absolute verity we have found that the record in these two cases discloses that appellants are denied due process if the judgments are allowed to stand in spite of the procedural defects. Is it any less a denial of due process to hold that a court may by its own fiat declare that requirements were met which the record discloses were not in fact met? We think not. See *Lutcher v. Allen*, *supra*, especially judgment on rehearing, 95 SW 572, 576. Although that case deals with a personal judgment, much of the reasoning is applicable here. See also *Hansberry v. Lee*, 311 U.S. 32, 40. It follows, therefore, that as to a nonresident defendant the rule

of absolute verity cannot be imposed to prevent an inquiry into the record facts showing that nonresident service was not legally obtained.

This rule of importing absolute verity would, of course, be no bar to the attack on the judgment in case No. 8471 in any event, because the undisputed fact that that judgment was entered seven days before the return day is not in conflict with any finding of the trial court, since none was made with respect to that matter.

The appellants made an equally determined attack on the two judgments on the ground that the failure of the plaintiff to plead or prove in his suit of trespass to try title, the very deeds he had given to Texas Little Farms Co. and which they had given to appellants amounted in law to a fraud on the court and on the appellants, entitling them to a judgment setting them aside.

In determining whether the filing of a suit to clear title without setting out the deeds the plaintiff himself had given, and which constituted the cloud from which he sought relief, can be the basis of an action to set aside the judgments, we find that the Texas courts have long held that intentional misleading actions that result in the withholding of an issue from the court that, but for such action, the other party would present to the court, may be the basis of a suit to set aside a judgment for fraud. See *Davis v. Terry*, 33 Tex. 426; *Mills v. Baird*, 147 SW. 2d 312. See full discussion also in *Alexander v. Hagedorn*, 226 SW 2d 996, where it is stated:

> "Only extrinsic fraud will entitle a complaint to relief, because it is a wrong act committed by the other party to the suit which has prevented the losing party either from knowing

> about his rights or defenses, or from having a fair opportunity of presenting them upon the trial . . . . In other words, fraud which denied him the opportunity to fully litigate upon the trial all the rights or defenses he was entitled to assert [quoting from State v. Wright, 56 SW 2d 950, 952]."

Considerations which impose a burden on a plaintiff in a suit against a nonresident to follow strictly the statutory requirements to obtain service by publication likewise impose a heavier burden on parties and courts to insure that the anticipated absence of such a defendant through his ignorance of the pendency of the action, coupled with the knowing failure of the plaintiff to present all facts relevant to the issue to be decided, does not prevent the absent defendant from having his case fairly outlined and litigated. The inescapable conclusion is that, knowing the defendant would not have any knowledge that his title was under attack, the plaintiff was required in good faith to the court and in order to afford the due process to which the defendants were entitled, to give to the court evidence to the effect that he himself had already purported to convey to others and ultimately to these defendants tracts of land as to which a colorable claim could be, and has now been, made that they were the same land for which his actions were filed. The plaintiffs' withholding from the court's consideration of the deeds and the interpreting evidence contained in releases he subsequently executed amounted to legal fraud of the type that may be availed of by appellants to set aside the judgments. There are no intervening equities, as the present defendants took from Bevil by descent.

The facts as to the omission of the information are not in dispute. The legal effect is clear. Equity could do no less than to prevent the appellees from using such judgments to their advantage.

There is no merit to the appellees' contention that this action by appellants is barred by the four year statute of limitations. The bar of the statute in an action to set aside a judgment for fraud in Texas does not commence to run until the plaintiff knows of the judgment, or in the exercise of due care ought to know of the judgment against him, *Levy v. Roper*, 113 Tex. 356, 256 SW 251. *Harrison v. Orr*, 10 SW 2d 381. "Manifestly the burden of proving that essential fact was upon Harrison [the party pleading the statutory bar] unless through evidence produced in his own behalf Orr [the party sought to be barred] proved it for him." *Harrison v. Orr*, 290 S.W. 2d 871, 873. Here appellees made no attempt to prove that appellants knew or ought to have known of the judgments against them more than four years before the suit was filed. In their complaint appellants alleged to the contrary and this allegation was neither admitted nor denied by appellees in their answer. The burden was thus on them to prove the defense, which they did not do.

The judgment of the trial court is reversed. The two Texas state court judgments described as follows: *John R. Bevil v. A. L. Chivers, et al.*, suit No. 8399, District Court of Hardin County, Texas; *John R. Bevil v. W. S. Johnson, et al.*, suit No. 8471, District Court of Hardin County, Texas, are void and they are set aside. The case is remanded to the trial court for the entering of such further equitable relief as is appropriate in light of this opinion and judgment.

THOMSON C. GAINES

MARY SMITH.

5000 VARAS
N. 80° E.

JAMES BLYTHE LEA.

BLOCK "A"

G. M. B. HAWLEY SUBDIVISION
OF THE
JOEL EDWIN HAWLEY LEAGUE
HARDIN COUNTY
TEXAS.

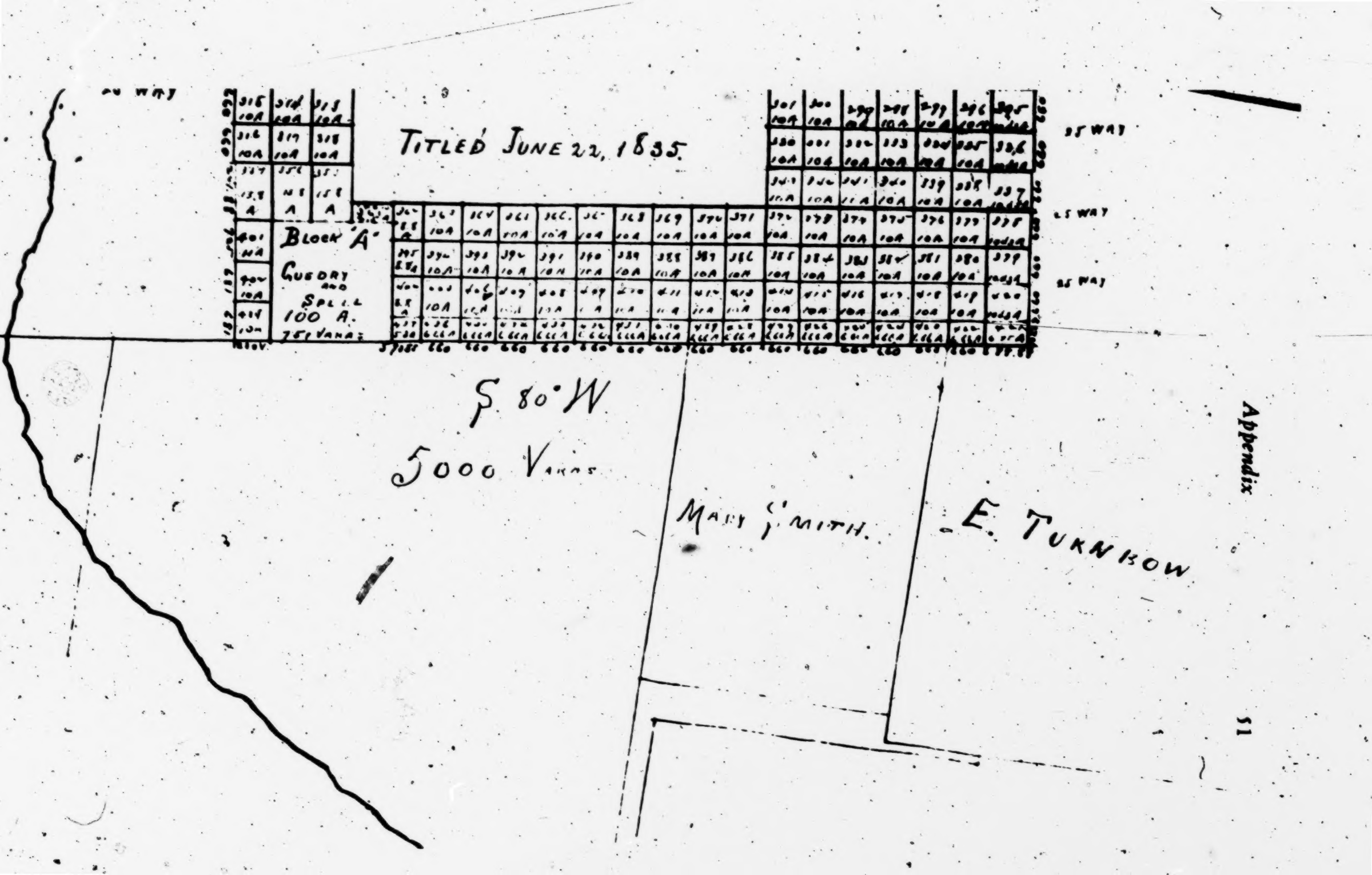
TITLED JUNE 22, 1835.

N. 10° W. 5000 VARAS

S. 10° E. 5000 VARAS

25 WAY

CAROLINA


TITLED JUNE 22, 1835.
BLOCK "A"
CUEORY AND SPILL
100 A.
75 VARAS
S 80° W
5000 VARAS
MARY J. SMITH.
E. TURNBOW
Appendix
51

THE STATE OF TEXAS,
COUNTY OF HARDIN.

I, CLARENCE McNEELY, Clerk of the County Court, in and for Hardin County, Texas, do hereby certify that the above and foregoing is a true and correct copy of a certain Plat from Geo. M. B. Hawley to Jorl Edwin Hawley Lg., as the same appears of record in Volume 22, Page 92, of the Deed Records in and for Hardin County, Texas.

GIVEN under my hand and seal of office, this the 2nd day of August, 1956.

CLARENCE McNEELY,
County Clerk.

Hardin County, Texas.

By MRS. FRANCIS DAVID,
Deputy.

(Seal)

CAMERON, Circuit Judge, Specially Concurring:

In concurring with the able and articulate opinion of the majority written by Judge Tuttle I feel constrained to set down a few remarks about jurisdiction. To my mind, the fundamental error of the court below is contained in its fourth conclusion of law reading thus:

> "This suit constitutes a collateral attack on the two State Court final judgments [sic] since each of such judgments is valid on its face such judgments import absolute verity and cannot be set aside or vacated in this proceeding."

That statement is expressive of views held by a great many people arising doubtless from the fact that it is not difficult to become so enamored of the shibboleths and the nomenclature of the judicial process as to lose sight of its realities and basic functions.

But I do not conceive that the Judiciary is invested with any such absolute power or that its edicts can be considered as possessed of such infallibility. On the other hand, it is my conviction that any court of competent jurisdiction, either state or federal, can adjudge the merits of any suit involving the validity of a final judgment of any other court, state or federal, where the basis for the attack is that the court rendering the questioned judgment did not have jurisdiction to render it, or that such judgment was procured by fraud. These are the grounds of the attack against the two state court judgments here.

This Court is, in my opinion, committed to this principle, *Bass v. Hoagland*, 1949, 172 F. 2d 205.[1] Hoagland sued

[1] Opinion by Judge Sibley. Judge Hutcheson dissenting.

Bass in the United States District Court for the Eastern District of Texas upon a judgment he had obtained in the United States District Court in Kansas. The judgment recited all of the facts necessary to show jurisdiction of the court and validity of the judgment. The attack of Bass sought to go behind the recitals of the judgment and to show facts which destroyed the right of the Kansas Court to enter the judgment which it had entered. Answering the argument that the court must limit itself, where charges similar to those made here are involved, to the language of the judgment, the opinion states (pp. 208-210):

> "It is also well settled law that its [the judgment's] express recitals import verity; and where the judgment is silent, if the court rendering it is one of record and of general jurisdiction, * * * all presumptions are in favor of its regularity. It is equally well settled that such presumptions may be overcome and that recitals as to things proper to be shown in the record on which the judgment rests may be overborne by reference to that record. It is also settled that a suit on a judgment, being a mode of enforcing it, does not open it to direct attack, and that any attack is collateral. * * *
>
> "* * *
>
> "* * * The answer says there was no evidence heard at all, and this is admitted for the present, and an admitted fact may be used on collateral attack as well as the record itself; 49 C. J. S., Judgments, §§ 421, 425, Note 17. The court reporter's record would show the actual truth. * * * The judgment states the plaintiff was not present at the trial; but only his counsel; and that no defendant was present in person or by counsel, so

there could have been no waiver of any right. Bass, living in Texas, did not know that the case had been called for trial till he was served in the present suit. This does not look like due process of law under the Constitution, nor even like a judicial trial. Bass' want of diligence in not sooner finding out what had become of his case is not questioned here, but the constitutional validity of this judgment under the admitted facts. Strong ground has been taken by the Supreme Court, and in strong language, against treating cases as in default which were not so. In Hovey v. Elliott, 167 U.S. 409, 17 S. Ct. 841, 42 L. Ed. 215, * * * On page 43 [should be 413-414] it is said: 'The fundamental conception of a court of justice is condemnation only after hearing. To say that courts have an inherent power to deny all right to defend an action and to render decrees without any hearing whatever is in the very nature of things to convert the court exercising such authority into an instrument of wrong and oppression, and hence to strip it of the attribute of justice upon which the exercise of judicial power necessarily depends.' "

Throughout the complaint in the case before us the state court judgments are attacked on the ground that procedural due process was not observed in their rendition.[2] Appellees rely on the two judgments as a defense against the attack of appellants. Procedural due process

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2 The proceedings are attacked in detail on the grounds that plaintiff's pleadings in the state court did not follow Texas statutes requiring that a plaintiff plead his title link by link and to plead the interest of the defendant as well as the description of the land by tract numbers; they are attacked, as the opinion of Judge Tuttle points out, for want of evidence necessary to make out plaintiff's case as well as for defects in the effort at constructive service by publication.

required that all provisions of the Texas statutes concerning process, pleadings and proof should be observed if the judgments are to have validity in the support of their title.

In *Griffin v. Griffin*, 1946, 327 U.S. 220, the Supreme Court denied enforcement in the District of Columbia of a judgment rendered by a New York State Court because of the failure of the litigant relying upon the judgment to show observance of the requirements of New York statutes as to notice. Referring to several Supreme Court cases and to Restatement of Judgments, Par. 11, Comment C, the Supreme Court said (pp. 228-229):

> "A judgment obtained in violation of procedural due process is not entitled to full faith and credit when sued upon in another jurisdiction * * * Moreover, due process requires that no other jurisdiction shall give effect, even as a matter of comity, to a judgment elsewhere acquired without due process."[3]

In *White et al. v. Union Producing Co.*, 1944, 140 F. 2d 176, we stated (p. 178):

> "Fraud vitiates everything it touches, it is difficult to define; there is no absolute rule as to what facts constitute fraud; and the law does not provide one 'lest knavish ingenuity may avoid it.'"

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[3] See also Smith v. O'Grady, 1941, 312 U.S. 329; Hansberry v. Lee, 1940, 311 U.S. 32; Davis v. Wechsler, 1923, 263 U.S. 22; United Shoe Machinery Co. v. United States, 1922, 258 U.S. 452; Ward v. Commissioners of Love County, Oklahoma, 1920, 253 U.S. 17; Postal etc. Co. v. Newport, 1918, 247 U.S. 464; Bigelow v. Old Dominion Co., 1912, 225 U.S. 111, and 30 A American Jurisprudence, Judgments, §§ 880 et seq.

A judgment obtained by fraud is a nullity. To establish the fraud as well as the want of jurisdiction to render the judgment for failure to observe the requirements of the state statutes, the court in which the judgment is brought in question may consider the entire record in the case, pleadings, process and evidence, and may, in proper cases, consider extrinsic evidence.[4]

The case before us presents a typical example where equity will intervene to insure that appellants are condemned only after hearing and that the whole proceeding will be invested with "the attribute of justice upon which the exercise of judicial power necessarily depends."

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HUTCHESON, Chief Judge, Dissenting:

Of the opinion that under settled law the effort in this suit constitutes a collateral attack on judgments which, containing plain jurisdictional recitals and no recital contrary thereto, must be accorded absolute verity and are, therefore, not subject to collateral attack,[1] I dissent from the opinion and decision of the majority.

The rule here relied on is thus correctly stated in *Bemis v. Bayou Development Co.*, 184 SW 2d 645, at p. 648:

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[4] Simon v. Southern Railway Co., 1915, 236 U.S. 115; 30A American Jurisprudence, Judgments, §§ 783-808; and see also ib. §§ 657, 855, 878-879.

[1] Of the uniform multitude of cases to that effect, these, some of which are suits by publication, may be cited: Wixom v. Bowles, 152 SW(2) 896 at 900; Hartel v. Dishman, 135 Tex 600; Chapman v. Kellogg, 252 SW 151, at 158-9

"In other words, this court fails to join the appellant in finding any fundamental error apparent upon the face of the foreclosure-judgment, but contrarily, is constrained to hold that its given recitals, as against the collateral attack herein made thereon, imported absolute verity to the extent that the pleadings, the citation, and other court papers appertaining thereto, cannot be looked to for any contradiction thereof, and that, in consequence, this controversy ends there; such is the law of Texas, as is made manifest by these authorities: Empire Gas & Fuel Co. v. Albright, 126 Tex. 485, 87 SW (2) 1092; Levy v. Roper, 113 Texas 365, 256 SW 251; Brown v. Clippinger, 113 Tex. 364, 256 SW 254; Hopkins v. Cain, 105 Tex. 591, 143 SW 1145; Martin v. Burns, 80 Tex. 676, 16 SW 1072; Chapman v. Kellogg, Tex. Com. App. 252 SW 151; Pure Oil Co. v. Reece, 124 Tex. 476, 78 SW (2) 932; Hartel v. Dishman, 135 Tex. 600, 145 SW (2) 865; Wixom v. Bowers, Tex. Civ. App., 152 SW (2) 896; writ refused for want of merit; Switzer v. Smith, Tex. Com. App. 300 SW 31, 68 A.L.R. 377 et seq.; Treadway v. Eastburn, 57 Tex. 209; Crawford v. McDonald, 88 Tex. 626, 33 SW 325."[2]

This does not mean that I am of the opinion that the judgment appealed from should be affirmed throughout. Quite to the contrary, I think it should be affirmed only to the extent that it holds that this is a collateral attack on the judgments and therefore cannot be maintained and that it should be reversed as to all other features of the judgment, with the result that, while the

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[2] See also Mills v. Baird, 147 SW(2) 312; State v. Wright, 56 SW(2) 952, and Alexander v. Hagedorn, 226 SW(2) 996, for a full statement and discussion of the controlling law, not only in Texas but generally, on collateral attack and extrinsic and intrinsic fraud.

right of plaintiffs to seek relief in this collateral proceeding is denied, their right to attack the judgments directly in the court which entered them would not be prejudiced or in any way affected hereby. Cf. *Kelly v. Wright*, 184 SW (2) 649, where a bill to review a judgment brought in the same court which had theretofore entered it was entertained. Indeed, I agree with the statement on page 6 of the opinion of the majority:

> "Appellees contend, and the trial court agreed, that the deeds under which appellants claim title to their respective lots were void for lack of adequate description of any land described in the state court suits. We think the trial court did not and neither do we reach this issue. The appellants need not show here any more than that they had a justiciable interest in the subject matter of the litigation; that is that they had a colorable claim to the land that was then before the court. We do not need to decide that appellants have good title to these tracts and we do not do so. We decide only that their allegations and proof entitle them to ask a court to look into their claim that the judgments were void."

In addition, however, to our fundamental differences on the question of collateral attack, I regard as in direct contradiction of the law as established in Texas, *Durst v. Park*, 177 SW (2) 301, and dissent from the conclusion of the court that the judgment in #8399 was made void by the fact that the affidavit for publication was filed two days before the filing of the suit.

Other holdings of the court from which I dissent as in complete contradiction of the statutes of Texas and the decisions thereunder are: (1) that there was a violation of the Texas statutes in the failure of the plaintiffs

in their petition in the publication suits to plead their titles specifically; (2) that their failure to introduce in evidence or otherwise bring up for adjudication in the publication suits the validity vel non and the effect of the instruments, the existence of which had caused them to institute the suits, constituted fraud requiring the setting aside of the judgments.

As clearly appears in the statutes and rules, the requirement for pleading title specifically, though at one time existing, had been repealed long before the suits here involved were brought. The applicable statutes and rules governing publication suits specifically provide that plaintiffs are required only to show a prima facie title and no decision in Texas has ever held, nor under the law could hold, that the failure to offer evidence as to the defendants' claim of title constituted fraud.

I respectfully dissent from the opinion and judgment.

## Judgment Of THE COURT OF APPEALS

### JUDGMENT

Extract from the Minutes of September 26, 1958.

MARGARET O'BOYLE, ET AL,

versus

JOHN R. BEVIL, JR., ET AL.

No. 17158

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Texas, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; the two Texas State Court judgments described as follows: John R. Bevil v. A. L. Chivers, et al, suit No. 8399, District Court of Hardin County, Texas; John R. Bevil v. W. S. Johnson, et al, suit No. 8471, District Court of Hardin County, Texas, are void and they are hereby set aside; and that this cause be, and it is hereby, remanded to the said District Court for the entering of such further equitable relief as is appropriate in the light of the opinion and judgment of this Court;

It is further ordered and adjudged that the appellees, John R. Bevil, Jr., and others, be condemned to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

Cameron, Circuit Judge, specially concurring.

Hutcheson, Chief Judge, dissenting.

## Order Of THE COURT OF APPEALS DENYING REHEARING

### ORDER DENYING REHEARING

Extract from the Minutes of November 7, 1958.

MARGARET O'BOYLE, ET AL,

versus

JOHN R. BEVIL, JR., ET AL.

No. 17158.

It is ordered by the Court that the petition for rehearing filed in this cause be, and the same is hereby, denied.

## APPENDIX E

## THE STATE COURT JUDGMENTS UNDER ATTACK IN THIS ACTION

No. 8399

| | | |
|---|---|---|
| JOHN R. BEVIL | § | IN THE DISTRICT COURT |
| vs. | § | OF |
| A. L. CHIVERS, ET AL. | § | HARDIN COUNTY, TEXAS |

### JUDGMENT.

BE IT REMEMBERED that on this, the 29th day of August, A. D. 1945, at a regular term of this court and in its regular order, came on to be heard the above entitled and numbered cause. And came the plaintiff, by his attorney, but the defendants, and ach of them, although duly and legally cited by publication to appear and answer herein, came not, in person or by an attorney of their own selection, but were represented by the Hon. Donald Allums, a practicing attorney of this court, who by order of this court dated August 20th, 1945, had been appointed to represent each and all of the defendants so cited by publication, and all parties announced ready for trial; a jury being waived all matters, as well of fact as of law, were submitted to the court; and after hearing the pleadings, the evidence and the argument of counsel, and being fully advised in the premises, the court finds that the defendants, and each of them, have been duly cited in terms of law and as required by law to appear and answer herein; and proof having been made and statement of the evidence having been reduced to writing, approved by the court and filed among the papers in this cause, in accordance with the statutes and rules in such case made

and provided, and the court being of the opinion that the plaintiff is entitled to judgment;

It is therefore, ORDERED, ADJUDGED AND DECREED by the court that the plaintiff, John R. Bevil, do have and recover of and from the defendants, A. L. Chivers, Robert E. Tipton, Jonas Berger, Wm. Morris, Jr., William L. Betts, Edward Armstrong, O. M. Hazelton, Peter Ruchnock, A. D. Davis, Mrs. Uina M. Lloyd, Mrs. Vina M. Lloyd, Gus Ollendike, Jr., W. S. Bloes, Charlotte Morrow, Arlington Brong, Frank Hubbard, John B. Kingsley, W. J. Baker, H. N. Barrett, H. M. Barrett, Andrew S. Hubbard, Isidore Feuer, Mr. and Mrs. Vernon D. Acker, Stephen Luchkarvich, Mr. and Mrs. C. M. Schreiner, Edmund J. Lewis, Ann Lewis, Olive Davis, Sadie E. Gromlich, Von Beck Brothers, W. N. Butts, Wm. Morris, H. F. Clark, James F. O'Boyle, Charles M. O'Boyle, E. Clayton Jones, Joseph A. Bodie, Jr., William J. Ferber, Robert A. Ferber, Robert J. Miller, Mrs. Uina M. Lloyd, Mrs. Vina M. Lloyd, Mrs. John J. Lawler, Anna Berger, Wm. Morris, Jr., W. N. Butts, Marie Camporini, Harry B. Hartman, Mary E. Merkel, David Armstrong, David S. Craemer, Chas. A. Brunner, K. W. Rittenhouse, Dr. C. A. Craig, Mrs. A. J. Fee, W. E. Lukens, H. D. Hale, C. S. Osburn, H. J. Schneidt, Martin A. Bower, Anna McLaughlin, Sarah Hennelly, Gertrude A. Dowd, T. Herbert Johnson, Mary P. Ellis, W. W. Thompson, the title and possession of the following described tract of land, lying and being situated in Hardin County, Texas and more particularly described as follows:

> Situated in Hardin County, Texas, being 348 acres of the Joel E. Hawley League, Abstract No. 26, and described as follows, to-wit:

BEGINNING at the Northwest corner of Block "A" of the G. M. B. Hawley Subdivision of said Hawley League, which beginning point is N. 80° E. 712 8/10 varas and South 10° E. 721 1/3 vrs. from the Northwest corner of the Hawley League;

THENCE S. 10° E. 751 1/2 vrs., stake for corner;

THENCE N. 80° E. 2613 6/10 varas, stake for corner;

THENCE N. 10° W. 751 1/2 varas, stake for corner;

THENCE S. 80° W. 2613 6/10 varas to the place of beginning.

And reference is here made to the plat of the G.M.B. Hawley Subdivision of the Joel E. Hawley League, as same is recorded in the Deed Records of Hardin County, Texas, Volume 22, pages 92 et seq., for descriptive purposes.

SAVE AND EXCEPT, an undivided one-eighth (1/8) of the minerals, in, on and under such land, reserved by Hawley Land, Oil and Development Company in its deed to W. D. Myers and J. R. Bevil, dated May 20, 1914, recorded in Volume 64, page 157, Deed Records of Hardin County, Texas, which instrument and its said record is being here referred to for a particular description of such reservation.

And it is the further order of the court that Writ of Possession in favor of the plaintiff issue against the defendants, and each of them for the lands hereinabove described, as often as may be necessary.

It is the further order of the court that the plaintiff pay all costs of this proceeding, for which execution may issue.

Clyde E. Smith
Judge Presiding.

NO. 8471

JOHN R. BEVIL § IN THE DISTRICT COURT
vs. § OF
W. S. JOHNSON, ET AL. § HARDIN COUNTY, TEXAS

JUDGMENT.

BE IT REMEMBERED that on this, the 7th day of January, A. D. 1946, at a regular term of this court and in its regular order, came on to be heard the above entitled and numbered cause. And came the plaintiff, by his attorney, but the defendants, and each of them, although duly and legally cited by publication to appear and answer herein, came not, in person or by an attorney of their own selection, but were represented by the Hon. Donald Allums, a practicing attorney of this court, who by order of this court dated January 7th, had been appointed to represent each and all of the defendants so cited by publication, and all parties announced ready for trial; and a jury being waived all matters, as well of fact as of law, were submitted to the court; and after hearing the pleadings, the evidence and the argument of counsel, and being fully advised in the premises, the court finds that the defendants, and each of them, have been duly cited in terms of law and as required by law to appear and answer herein; and proof having been made and statement of the evidence having been reduced to writing, approved by the court and filed among the papers in this cause, in accordance with the statutes and rules in such case made and provided, and the court being of the opinion that the plaintiff is entitled to judgment;

It is, therefore, ORDERED, ADJUDGED AND DECREED by the court that the plaintiff, John R. Bevil, do have and recover of and from the defendants W. S. Johnson, William S. Johnson, A. L. Chivers, Robert E.

Tipton, Jonas Berger, Wm. Morris, Jr., William L. Betts, Edward Armstrong, O. M. Hazelton, Peter Rushnock, A. D. Davis, Mrs. Uina M. Lloyd, Mrs. Vina M. Lloyd, Gus Ollendike, Jr., W. S. Bloes, Charlotte Morrow, Arlington Brong, Frank Hubbard, John B. Kingsley, W. J. Baker, H. N. Barrett, H. M. Barrett, Andrew S. Hubbard, Isidore Feuer, Mr. and Mrs. Vernon D. Acker, Stephen Luchkarvich, Mr. and Mrs. C. M. Schreiner, Edmund J. Lewis, Ann Lewis, Olive Davis, Sadie E. Gromlich, Von Beck Brothers, W. N. Butts, Wm. Morris and H. F. Clark, James F. O'Boyle, Charles M. O'Boyle, E. Clayton Jones, Joseph A. Bodie, Jr., William J. Ferber, Robert A. Ferber, Robert J. Miller, Mrs. Uina M. Lloyd, Mrs. Vina M. Lloyd, Mrs. John J. Lawler, Anna Berger, Wm. Morris, Jr., W. N. Butts, Marie Camporini, Harry B. Hartmann, Mary E. Merkel, David Armstrong, David S. Creamer, Chas. A. Brunner, K. W. Rittenhouse, Dr. C. A. Craig, Mrs. A. J. Fee, W. E. Eukens, H. D. Hale, C. S. Osburn, H. J. Schneidt, Martin A. Bower, Anna McLaughlin, Sarah Hennelly, Gertrude A. Dowd, T. Herbert Johnson, Mary P. Ellis, W. W. Thompson, Albert Paskiewiez, H. A. Reiferberg, G. W. Fetzer, Henry Fetzer, Henry La Rose, and each of them, the title and possession of the following described tract of land, lying and being situated in Hardin County, Texas, and more particularly described as follows:

Situated in Hardin County, Texas and being a part of the Joel E. Hawley League, Abstract No. 26, described by metes and bounds as follows:

BEGINNING at the Southwest corner of the North 2059 acres of such Hawley League, set aside to John R. Bevil in partition deed dated September 11, 1919, recorded Volume 82, pages 633 et seq., Deed Records of Hardin County, Texas, a stake from which a group of four small pecans brs. South 8 deg. West 4 vrs., a sweet gum 7" in dia. brs. North 79 deg. W. 1 vara,

and a pin oak 12" in dia. brs. North 78 deg. W. 8 varas;

THENCE North 80 deg. E. 4750 vrs., stake for corner;

THENCE North 10 deg. W. 187.1 vrs., stake for corner;

THENCE South 80 deg. W. 1423 6/10 vrs., stake for corner;

THENCE North 10 deg. West 665.3 vrs. to stake for corner;

THENCE South 80 deg. W. 2613 6/10 vrs. to stake for corner;

THENCE South 10 deg. East 665 3/10 vrs. to stake for corner;

THENCE South 80 deg. W. 712 8/10 vrs. to stake for corner in West line of Hawley League;

THENCE South 10 deg. E. 187 1/10 vrs. to place of beginning, containing 482 7/10 acres, more or less.

SAVE AND EXCEPT an undivided one-eighth (1/8) of the minerals in, on and under such land, reserved by Hawley Land, Oil and Development Company in its deed to W. D. Myers and J. R. Bevil, dated May 20, 1914, recorded in Volume 64, page 157, Deed Records of Hardin County, Texas, which instrument and its record is being here referred to for a particular description of such reservation.

And it is the further order of the court that Writ of Possession in favor of the plaintiff issue against the defendants, and each of them, for the lands hereinabove described, as often as may be necessary.

It is the further order of the court that the plaintiff pay all costs of this proceeding, for which execution may issue.

Clyde E. Smith
Judge Presiding